TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 424

EDWARD E. JENKINS, AS RECEIVER OF THE NATIONAL CITY BANK OF SALT LAKE CITY, UTAH; E. J. GROESBECK, TREASURER OF SALT LAKE COUNTY, UTAH, ET AL., PETITIONERS,

vs.

NATIONAL SURETY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 2, 1927

CERTIORARI GRANTED OCTOBER 31, 1927

(32,876)

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 7409

NATIONAL SURETY COMPANY, A CORPORATION, APPELLANT,

vs.

EDWARD E. JENKINS, RECEIVER OF THE NATIONAL CITY BANK OF SALT LAKE CITY, UTAH, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

FILED MARCH 30, 1926.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1927

1 United States of America,
District of Utah—ss.

Pleas of the District Court of the United States for the District of Utah, at a stated term begun and holden at Salt Lake City, on the second Monday, being the thirteenth day of April, in the year of our Lord nineteen hundred and twenty-five and the one hundred and forty-ninth year of the Independence of the United States of America.

Present:

Honorable Tillman D. Johnson, United States District Judge for the District of Utah.

Transcript of the Record.

National Surety Company, a corporation, plaintiff,
No. 8851, vs Equity (Law)
Edward E. Jenkins as Receiver of The National City Bank of Salt Lake City, Utah, defendant,
vs.
E. J. Groesbeck and the American Surety Company of New York, a corporation, Interpleaded defendants.

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2 (Complaint.)

Filed in United States District Court District of Utah Apr. 28 1925 John W. Christy, Clerk.

Plaintiff complains of the defendant and for cause of action alleges:

1. That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of New York and is a citizen and resident of the State of New York and is duly authorized by its charter to engage in the business of suretyship, and is further duly qualified, under the laws of the State of Utah, to carry on said business of sure-

tyship in the State of Utah, and it is, and during all times hereinafter mentioned, has been engaged in said business in the State of Utah.

2. National City Bank of Salt City is a national banking association and a corporation organized and existing under the laws of the United States and in particular under the act of Congress known as the "National Banking Act," and has its office and place of business in the City of Salt Lake, State of Utah, and is a citizen and resident of said State of Utah.

3. That the defendant Edward E. Jenkins is a citizen and resident of the State of Utah. That on the 17th day of January, 1922, the said National City Bank of Salt Lake City, Utah closed its doors and thereafter the Comptroller of the Currency of the United States took possession of said National City Bank and appointed the defendant Edward E. Jenkins as Receiver thereof. That thereafter the said defendant Edward E. Jenkins, as such Receiver, took possession of the books, records and assets of every description of said National City Bank and as such Receiver is charged with the duty of and is proceeding to liquidate the business and assets of said Bank.

4. That the amount in controversy in this suit, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

5. That at all times herein mentioned Salt Lake County was and is a County duly organized and existing under the laws of the State of Utah; that Edward J. Groesbeck was, during all the times herein mentioned, and now is the duly elected, qualified and acting County Treasurer of Salt Lake County, and as such, among other things was required by the laws of the State of Utah to receive all moneys belonging to said Salt Lake County, to safely keep the same, and apply and pay out the same according to law.

6. That under the laws of the State of Utah, to-wit, Section 4500 Compiled Laws of Utah 1917, a County Treasurer is authorized to deposit the public funds in his custody in a bank, provided that he complies with said Section and requires such bank to furnish a good and sufficient surety company bond or personal bond sufficient in amount to fully protect such funds so deposited by him.

7. That prior to the 3rd day of January 1921, and while the said National City Bank was actively engaged in the business of conducting a national bank, the said Edward J. Groesbeck, as Treasurer of Salt Lake County, designated the

said National City Bank as the depository for the funds of Salt Lake County, Utah, and required that said Bank furnish a depository bond as required by law under the statutory provision hereinbefore referred to, in the amount of $125,000.00. That on December 22, 1920, the said National City Bank, pursuant to such requirement, requested
4 this plaintiff, National Surety Company, to sign, execute and deliver to said Edward J. Groesbeck, as such County Treasurer, and in its behalf, such a bond in the sum of $125,000.00, and as an inducement and the consideration for the execution of said bond, and prior to the delivery of the same to the said Edward J. Groesbeck, County Treasurer, the National Surety Company demanded and received from said National City Bank its written application and Indemnity Agreement for said bond, a true copy of which application and Indemnity Agreement is hereto attached, made a part hereof and marked Exhibit "A," whereby it made to the plaintiff the representations set out upon the face thereof, and wherein it did apply to the plaintiff for and requested that the plaintiff execute a bond on its behalf in the sum of $125,000.00, in favor of said Edward J. Groesbeck as such County Treasurer of Salt Lake County, to become effective on January 3, 1921, to qualify said National City Bank as such depository of County funds, under the statutes of Utah, and to protect the deposit of such County funds in said bank, up to the amount of $125,000.00. That following the representations contained in said application and as part thereof and by way of further inducement and consideration to the plaintiff to execute said surety bond in behalf of said bank, it did make to the plaintiff and with it entered into the Indemnity Agreement which is a part of said application as set out in said Exhibit "A", and to which reference is hereby made, and which provides, among other things that said Bank will at all times indemnify and keep indemnied the plaintiff and save it harmless from and against all claims, demands, liabilities, costs, charges, and expense of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the plaintiff, its successors and assigns, all sums and amounts
of money to meet every claim, demand, liability, cost,
5 charge, expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the plaintiff shall be required to pay thereunder; and that the plaintiff shall have the right to look to and rely

upon the property of the Bank and its income and earnings, and to follow and recover out of the Bank's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof, for anything due or to become due the plaintiff under this Agreement, the execution of the said Bond by the plaintiff being for the Bank's special benefit and protection of the Bank's property, its income and earnings.

8. Pursuant to the said representations, Indemnity Agreement and other covenants contained in the said application for said bond, to-wit, Exhibit "A", and induced thereby, and upon the consideration of the payment of the premium therein provided, the plaintiff, on January 3, 1921, made, executed and delivered to said Edward J. Groesbeck as such County Treasurer, and became resonsible as surety for said Bank and on its behalf upon a depository bond in the amount of $125,000.00 unto Edward J. Groesbeck as Treasurer of Salt Lake County State of Utah, in the form as drawn and required by said Treasurer for depository bonds to be furnished by depositories of County funds, a true copy of which said bond is hereto attached, made a part hereof and marked Exhibit "B".

9. That thereafter, and while said National City Bank of Salt Lake City, Utah, was still engaged in the business of a national banking association, and between the said 3rd day of January 1921 and the said 17th day of January 1922, the said Edward J. Groesbeck did, from time to time, make deposits of said County funds in said Bank. That on the 17th day of January 1922, when the said National City Bank closed its doors and suspended business, there was on deposit in said National City Bank the sum of $643,094.29 of the funds of Salt Lake County, Utah, deposited by said
6 Edward J. Groesbeck as it Treasurer. That thereafter said Salt Lake County and Edward J. Groesbeck, its Treasurer, made formal demand in writing upon the plaintiff to make immediate payment of the said deposits, up to the amount of said bond, to-wit, $125,000.00. Pursuant to the said demand, plaintiff was obliged to and did on the 17th day of June 1922, pay to Edward J. Groesbeck as Treasurer of Salt Lake County, and to Salt Lake County the full sum of $125,000.00.

10. That heretofore and subsequent to the aforesaid payment, the National Surety Company duly transferred and assigned to the American Indemnity Company, a corporation,

of Galveston, Texas, $5,000.00 of its said claim of $125,000.00 hereinbefore set forth. That from the time of said assignment, continuously, said National City Bank has been and still is indebted to said National Surety Company, on account of the matters herein stated, in the sum of $120,000.00.

11. That heretofore and prior to the commencement of this action, to-wit, on April 10, 1925, this plaintiff duly presented to and filed with the defendant its verified claim herein for said sum of $120,000.00 by virtue of said Indemnity Agreement, a (true copy of which claim is hereto attached. made a part hereof and marked Exhibit "C",) and therein demanded that said defendant Receiver approve of its said claim as a creditor of said Bank, in the amount of $120,000.-00 by virtue of the Indemnity Agreement made, executed and delivered to it by said Bank, as hereinbefore alleged, by the terms of which Agreement the said Bank contracted that it would indemnify and save the plaintiff harmless from and against all claims and demands which it should at any time sustain or incur by reason of having executed said bond, and that it would repay to the plaintiff all sums of money paid out by it on account of any claims or demands made under said bond; but that the said defendant refused and now refuses to allow or approve said claim or to ay this plaintiff dividends thereon. That no part of said debt of said
7 National City Bank to this plaintiff, arising out of said Indemnity Agreement or otherwise or at all, has been paid by said Bank or anyone in its behalf, and that there are no setoffs or counterclaims to the same and that no assignments have been made excepting as above set forth.

12. That by reason of said Indemnity Agreement and said bond and the payment made by said plaintiff as hereinbefore alleged, there is now justly due and owing from said National City Bank and its Receiver to this plaintiff, the sum of $120,-000.00. That this plaintiff has demanded of said Receiver, and it is entitled, to have its said claim in said sum allowed and approved by said defendant Receiver and dividends paid to it in the amount and upon the same basis as heretofore paid to other claimants in the list of common claims against said Bank, and that all future dividends to be declared and made payable to said common creditors by said defendant Receiver, be paid to this plaintiff ratably with other creditors, upon said sum of $120,000.00.

Wherefore, plaintiff prays for judgment herein as follows:

1. That plaintiff's claim herein in the sum of $120,000.00 be allowed and approved and that plaintiff have and recover

judgment against the defendant herein, as Receiver of said National City Bank, in the sum of $120,000.00.

2. That the court enter judgment herein that the plaintiff is entitled to participate with the other creditors of said Bank upon its said debt of $120,000.00, ratably in all distribution of dividends, including all dividends yet to be paid, as well as those already paid by said defendant Receiver.

3. That the defendant Receiver be directed to pay to this plaintiff dividends in the amount and upon the same basis as paid to other claimants in the list of common creditors, and also that all future dividends to be declared and made payable to said common creditors, be paid to this plaintiff ratably with other creditors, upon said sum of $120,000.00.

8 4. For plaintiff's costs herein incurred.

ARTHUR E. MORETON
Attorney for Plaintiff.

State of Utah.
County of Salt Lake—ss.

Fred A. Moreton, being first duly sworn, deposes and says that he is an officer, to-wit, the Resident Assistant Secretary, of the National Surety Company, the plaintiff in the above entitled action, and as such officer is its agent and makes this verification for and on its behalf; that he has read the above and foregoing Complaint, knows the contents thereof and that the same is true.

FRED A. MORETON

Subscribed and sworn to before me this 27th day of April, 1925.

ARTHUR E. MORETON,
Notary Public
(Seal) Residing at Salt Lake City, Utah.

My Commission expires April 18, 1927.

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9 Exhibit "A".

"Safety First"
National Surety Company
Capital and Surplus over $8,000,000.00

Under Chapter 340 of the Laws of 1912 of the State of New York, any person obtaining property or credit by use

of a false statement is guilty of a misdemeanor punishable by fine or imprisonment or both.

Application By A Bank Or Trust Company For Depository Bond National Surety Company:

Application is hereby made by the undersigned for a bond the amount and tenor of which are herein set forth.

1. Name and Location of Bank or Trust Company. (Give correct corporate title) National City Bank of Salt Lake City, Utah.

2. Name of Obligee to whom bond is to run Edw. J. Groesbeck, County Treas.

3. Amount of bond, $125,000.00.

4. Maximum amount of deposit bond is required to secure $125,000.00.

5. (a) Specify rate of interest to be paid 2½ (b) Moneys covered by this bond: County.

6. Date from which bond is required: Jan 1, 1921.

7. Date upon which bond is to terminate Dec. 31, 1922.

8. Do you agree to pay $625.00 premium annually: Yes.

9. When was Bank or Trust Company incorporated and under the laws of what State was the incorporation had? Utah—1912.

10. Date of beginning business Feb. 1913. If reorganized, state when.....

11. Authorized capital $250,000.00.

12. Amount of stockholders' liability, if a State Bank $.....

13. When was last dividend declared, paid and amount:

14. When was the last examination made by National or State Bank Examiner? A. Nov. 29, 1920.

15. Do you belong to the Clearing House Association? Yes.

15a. If not, why do you not belong to the Association?

16. Give names and titles of the officers who give continuous personal attention to the affairs of the Bank or Trust Company.

10 Name	Titles
Frank Pingree	Cashier
W. G. Goodart	Asst. Cash.
Geo. N. Lambourne	President
J. P. Gardner	Vice Pres.
Henry W. Wallace	" "

17. By whom are the loans of the Bank or Trust Company directly authorized?

18. The following is a true financial statement of said Bank or Trust Company, showing its resources and liabilities at the close of business on the 22nd day of Dec. 1920.

Resources.

Loans and Discounts	2129631.70	
Amount of above loan to directors		
What amount secured by collateral $60550.00		
Amount of above loans to officers, not directors, approved by directors		
What amount secured by collateral		
Overdrafts, secured, $.....:		
unsecured	3262.31	
U. S. Bonds to secure Circulation	250000.00	
U. S. Government, State & Municipal bonds	1327227.12	
Other stocks, bonds, mortgages		
Banking House, $.....:		
Furniture & Fixtures	100000.00	
Other Real Estate owned		
Due from approved Reserve Agents	$476236.47	
Due from other Banks and Bankers	521313.10	
Checks and other Cash Items	20992.73	2118542.30
Fractional Currency, Legal Tender Notes, Specie, etc.		
Total		
Other Resources		12500.00
Total Resources		5941163.43

Liabilities

Capital Stock paid in	250000.	
Paid in Surplus, Earned Surplus	55000.	
Undivided Profits	9211.95	
National Bank Notes outstanding	246100.00	
Due to Banks	324693.76	
Individual Deposits subject to check		
Time Certificates of Deposit		
Savings Deposits Postal	65558.87	
Other Deposits	4112756.34	5063320.92
Total		
Dividends unpaid		777842.51
Notes and Bills rediscounted		100000.00
Bills Payable		594163.43
Total liabilities		

11 19. State rate of interest paid on various classes of deposits Ind. Dep. 2½ per cent—Time certif. of dep. 4 per cent—sav dep. 4 per cent—Other deposits 4 per cent.

20. Specify Town, City, County and other public or special deposits:

Depositor:	Amount Deposited:	Rate Int. Per Cent:	Surety Bond:	Amt. of Bond	Date of Expiration.

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21. Do officers and employees give Corporate Surety Bonds? Blanket Bond. Give name of Surety U. S. F. & G. Co. Expiration date.....

22. Does Bank carry Burglar Insurance? Yes.

Amount: 150,000.00 Name of Company: Nat'l Surety: Expiration 1922-1923.

23. How much past due paper are you carrying? None.

24. If a National Bank state whether you are on the Comptroller of the Currency's special list: Yes.

This Agreement made between National City Bank (hereinafter called the Depository), and the National Surety Company (Hereinafter called the Company),

Witnesseth:

Whereas, the company has executed, or is about to execute, for the Depository, the bond described in the foregoing ap-

plication, which application is hereby referred to and made a part of this Agreement:

Now, therefore, in consideration of the execution of said bond and the sum of One Dollar paid to the Depository by the Company, the Depository covenants and agrees with the Company as follows:

1. That all declarations and answers made in the foregoing application are true, and that the same are made for the purpose of inducing the Company to execute the Bond applied for without demanding collateral security from the Depository.

2. That the Depository will pay to the Company, or its duly authorized Agent, the premiums agreed in said application to be paid.

3. That the Depository will, at all times, indemnify and keep indemnified the Company and save it harmless from and against all claims, demands, liabilities, costs, charges, and expense of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost, charge expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.

12 4. That the Depository will immediately notify the Company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or the commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge, by reason of the execution of said Bond.

5. That the Depository will, on request of the Company, procure the Company's discharge from liability under said bond, and the Company shall, at its option, have the right to the use of the Depository's name, and to all the rights and privileges of the Depository, and at any time shall have the right to be discharged from liability for the further default of the Depository and to require the Depository to account and give new surety or sureties.

6. That vouchers or other evidence of payment by the Company in discharge of any liability under said Bond shall

be prima facie evidence against the Depository of the fact and the amount of the Depository's liability to the Company.

7. That the Company shall have the right to look to and rely upon the property of the Depository and its income and earnings, and to follow and recover out of the Depository's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof, for anything due or to become due the Company under this Agreement, the execution of the said Bond by the Company being for the Depository's special benefit and protection of the Depository's property, its income and earnings.

8. That the acceptance of this agreement, and of the Depository's agreement to pay premiums for the execution of said Bond, or the acceptance at any time by the Company of other securities, shall not in any way abridge or limit the right of the Company to be subrogated to any right or remedy or limit any right or remedy which the Company might otherwise have, acquire, exercise or enforce, and the Company shall have every right and remedy which the individual surety acting without compensation would have.

9. It is understood and agreed that the Company reserves the right to decline to issue the bond for which application is hereby made, and that no claim may be made against the Company in consequence of its failure to execute such bond; nor shall any claim be made in case the bond, executed, be not accepted by or on behalf of the obligee.

In witness whereof, the Depository, by authority of its Board of Directors, or Trustees, has caused this agreement to be duly signed by its President, and Cashier or Secretary, and its corporate seal to be thereto affixed this 22nd day of December, 1920.

In Presence of

NATIONAL CITY BANK of Salt Lake City
Give Name of Bank.
By J. P. Gardner, V. President.

Attest:
Frank Pingree,
Cashier.

(Corporate Seal)

13 Exhibit "B".

"Depository Bond"

Know All Men By These Presents: That The National City Bank of Salt Lake City, Salt Lake County, Utah, as Principal and The National Surety Company, a corporation of the State of New York, as Surety, are held and firmly bound unto Edward J. Groesbeck, Treasurer of Salt Lake County, Utah, in the sum of One Hundred and Twenty Five Thousand ($125,000.00) Dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Dated the Third day of January, A. D. 1921.

Whereas, The said principal The National City Bank of Salt Lake City, has applied for a part of the funds in the treasury of the County of Salt Lake, State of Utah, to be deposited in said bank, the amount whereof shall be subject to withdrawal or diminution by said treasurer as the requirements of said County of Salt Lake shall demand, and which amount may be increased or decreased as the said treasurer may determine; and

Whereas: the said Bank, in consideration of said deposit and for the privilege of keeping the same, has agreed to pay to the said County of Salt Lake, State of Utah, interest on such sum at a rate not less than two per cent per annum, on the amount of said deposit, the same to be credited and paid monthly upon the daily average of such amount as the said bank shall have on deposit for the month, or any fraction thereof, next preceding the crediting or payment of said interest, which interest shall be computed and credited to the account of the Treasurer of Salt Lake County and shall become thenceforth a part of such deposit.

Now, Therefore, if the said The National City Bank of Salt Lake City, shall, at the beginning of each and every month
14 render to the said Edward J. Groesbeck, Treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Lake's money held by it during the month next preceding, and the interest thereon, and how the same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, Treasurer as aforesaid, and shall pay over the same, and any part thereof,

upon the check or written demand of the said Edward J. Groesbeck, Treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects, save and keep the said Edward J. Groesbeck, Treasurer, harmless and indemnified for and by reason of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue.

Provided, That, if the said Surety shall so elect, this bond may be cancelled at any time by giving thirty days' notice in writing to the said Treasurer, and to the persons authorized by law to approve of such bond, such notice to be accompanied by a sworn statement of all facts and setting forth the reasons in connection with such request for cancellation, and this bond shall be deemed cancelled at the expiration of said thirty days, and said Surety remaining liable for all or any acts covered by this bond which may have been committed by said The National City Bank of Salt Lake City, up to and including the date of expiration of said thirty days notice. The said surety shall, upon the surrender of this bond and its release from all liability thereunder, upon request, refund this premium paid, less a pro rata part thereof for the time this bond shall have been in force.

Signed and sealed, the day and year first above written.

THE NATIONAL CITY BANK OF SALT LAKE CITY,
By H. J. Wallace, Vice-President.

NATIONAL SURETY COMPANY,
By J. B. Moreton,
Its attorney-in-fact.

Attest:
F. M. Pingree, Cashier.

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15 Exhibit C.

Claim of National Surety Company.

In the Matter of the Receivership of National City Bank of Salt Lake City.

State of New York,
County of New York—ss.

H. J. Lofgren, being first duly sworn, deposes and says that he is an officer, to-wit, the Vice-president of the National

Surety Company, a corporation organized and existing under the laws of the State of New York with its principal place of business at New York City, in said state; that as such officer he is its agent and that he is authorized to make this Proof of Claim.

That the claimant National Surety Company was, at all times herein mentioned, and is now, engaged in the business of furnishing surety bonds, and during all such times has complied with the provisions of the constitution and laws of the State of New York and Utah, so as to entitle it to do business in each of said states.

That the National City Bank is a national banking corporation organized and existing under and by virtue of the laws of the United States and particularly under the act of Congress known as the "National Banking Act", and has its office and place of business in Salt Lake City, Utah.

That at all times herein mentioned, Edward J. Groesbeck was, and now is, County Treasurer of Salt Lake County, State of Utah; that the laws of the State of Utah, to-wit, Section 4500, requires that the County Treasurer shall, before making a deposit in any bank, require from such depository collateral security or a good and sufficient surety company bond or a personal bond approved by him and sufficient in amount to fully protect such funds.

16 That while the said National City Bank was actively engaged in the business of conducting a national bank at Salt Lake City, Utah, and prior to the 3rd day of January, 1921, the said Edward J. Groesbeck, being then and there about to deposit funds in said National City Bank, required that the said Bank furnish to him, as a condition precedent to the depositing of the funds of said County in said Bank and as a guarantee of the repayment of the same, a depository bond in the sum of $125,000.00, under the statuory provision referred to.

That the said National City Bank applied to this claimant National Surety Company for such a surety bond, and that as an inducement and the consideration for the execution of said bond by this claimant, and prior to the delivery of the same. the National Surety Company demanded and received from said National City Bank its written indemnity agreement, in which it is provided in part as follows:

"That the Depository will, at all times, indemnify and keep indemnified the Company and save it harmless from and

against all claims, demands, liabilities, costs, charges, and expense of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse, and make good to the Company, its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost, charge, expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.

"That the Depository will immediately notify the Company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or the commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge, by reason of the execution of said Bond. * * * * * * * * *

"That the Company shall have the right to look to and rely upon the property of the Depository and its income and earnings, and to follow and recover out of the Depository's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof, for anything due or to become due the Company under this Agrement, the execution
of the said Bond by the Company being for the De-
17 pository's special benefit and protection of the Depository's property, its income and earnings."

That the said National Surety Company did thereafter, to-wit, on the 3rd day of January, 1921, make, execute and deliver to said Edward J. Groesbeck, as County Treasurer, and to Salt Lake County, its bond in the sum of $125,000.00, executed by the said National City Bank as principal and by the said Edward J. Groesbeck as such County Treasurer and funds were thereafter deposited by him in said National City Bank. That the said bond contained the following provision:

"Now, therefore, if the said The National City Bank of Salt Lake City, shall, at the beginning of each and every month render to the said Edward J. Groesbeck, Treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Lake's money held by it during the month next preceding, and the interest thereon, and how the same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, Treasurer as afore-

said, and shall pay over the same, and any part thereof, upon the check or written demand of the said Edward J. Groesbeck, Treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects, save and keep the said Edward J. Groesbeck, Treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue."

That thereafter, the said Edward J. Groesbeck, as such County Treasurer, did make deposits in said National City Bank and at the time of the failure of said Bank on the 17th day of January, 1922, had on deposit in said Bank, of the funds of said Salt Lake County, $643,094.29. That following the closing of said Bank on said day, Edward E. Jenkins was appointed as Receiver of said Bank and now is the duly appointed, qualified and acting Receiver of said Bank.

That following the failure of said Bank, the said Edward J. Groesbeck as County Treasurer, and Salt Lake County, made formal demand in writing upon this claimant to make immediate payment to it and to them of the said depos-
18 its up to the amount of said bond, to-wit, $125,000.00, and because of said demand and because of the breach of said bond by said National City Bank, this claimant was obliged to and did, on or about the 17th day of June, 1922, pay to said Edward J. Groesbeck, and Salt Lake County, the said sum of $125,000.00.

That heretofore, and subsequent to aforesaid payment, the National Surety Company duly transferred and assigned to the American Indemnity Company, a corporation, of Galveston, Texas, $5000.00 of its said claim of $125,000.00 hereinbefore set forth. From the time of said assignment continuously said National City Bank has been and still is indebted to said National Surety Company on account of the matters herein stated in the sum of $120,000.00. No further or additional assignments or transfers of any portion of said claim has been made and this claimant is the sole and exclusive owner thereof to the extent of said $120,000.00.

That no part of said debt of said National City Bank, to this claimant, arising out of said Indemnity Agreement, or otherwise or at all, has been paid, that there are no set-offs or counter-claims to the same and that no assignments have been made excepting as above set forth and that the full amount of said sum of $125,000.00 was, at the time of said

payment by this claimant as aforesaid on to-wit, June 17, 1922, and resulting therefrom and from said indemnity agreement and said bond, justly due and owing from said National City Bank to this claimant National Surety Company, and there is now justly due and owing from said National City Bank to this claimant, National Surety Company, said balance in the sum of $120,000.00 and that no part thereof has been assigned or transferred and that no part thereof has been paid and that there are no set-offs or counter-claims to the same.

That the said National Surety Company demands that its claim, as above set forth, in the sum of $120,000.00, arising out of the express promise and agreement of said National City Bank to reimburse said National Surety Company and hold it harmless be allowed and approved and that dividends, in the amount and upon the same basis as heretofore paid to other claimants in the list of common claims and also that all future dividends to be declared and made payable to said common creditors, be paid to this claimant ratably with other creditors, upon said sum of $120,000.00.

19

H. J. LOFGREN,

NATIONAL SURETY COMPANY
A. C. H.
By H. J. Lofgren, Vice-President.

Subscribed and sworn to before me this 31st day of March, 1925.

(Seal) WM. W. WEAVER,
Notary Public, Residing at New York City, N. Y.

My commission expires March 30, 1926.

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20 (Demurrer of Defendant to Complaint.)

Comes now the defendant and demurs to plaintiff's complaint on file herein, and for grounds of demurrer says:

1. That said complaint is vague and ambiguous in this, that it is not alleged therein whether the deposit made in The National City Bank by Salt Lake County or by E. J. Groesbeck, its treasurer, has been fully repaid and if so to whom it has been repaid.

2. It appears from the face of said complaint that the matters and things therein alleged have already heretofore been adjudicated in this court in an action entitled, "Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of said Salt Lake County, and American Surety Company of New York, a corporation, plaintiffs, vs. Edward E. Jenkins, as Receiver of The National City Bank of Salt Lake City, Utah, a National Banking Association, defendant, National Surety Company of New York, a corporation, American Indemnity Company, a corporation, and Massachussetts Bonding & Insurance Company, a corporation, interpleaded defendants", and the plaintiff is not entitled to have the same matters and things again reviewed.

3. That said complaint fails to state facts sufficient to constitute a cause of action against this defendant.

Wherefore, defendant prays that plaintiff's action be dismissed and that defendant be permitted to go hence
21 with his costs.

BAGLEY, JUDD & RAY
Attorneys for Defendant.

Received copy of the foregoing demurrer this 2 day of June, 1925.

ARTHUR E. MORETON
Attorneys for Plaintiff.

I, Paul H. Ray, hereby certify that I am one of the attorneys for the defendant in the above entitled action; that I have read the plaintiff's complaint on file herein and have also read the foregoing demurrer; that I verily believe that the foregoing demurrer to plaintiff's complaint on file herein, is meritorious and well taken and should be sustained.

PAUL H. RAY

Filed in United States District Court, District of Utah, Jun 2, 1925, John W. Christy, Clerk.

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22 (Order overruling Demurrer to Complaint.)

September 28, 1925.

At this 28th day of September, 1925, comes said plaintiff by A. E. Moreton, its attorney, and said defendant by Paul H. Ray, his attorney, also comes. And the demurrer of defendant to the complaint herein coming on now regularly to

be heard, the same is argued by counsel, and the Court being well advised in the premises, doth overrule said demurrer, with leave to defendant on or before October 10, 1925, to answer the complaint herein as he shall be advised.

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23 (Answer.)

Comes now the defendant, Edward E. Jenkins, as Receiver of The National City Bank of Salt Lake City, Utah, and for answer to plaintiff's complaint on file herein admits, denies and alleges:

I. Defendant admits paragraph 1 of plaintiff's complaint.

II. Defendant admits paragraph 3 of said complaint.

III. Defendant admits paragraph 4 of said complaint.

IV. Defendant denies each and every allegation in plaintiff's complaint contained not herein specifically admitted or qualified.

V. Further answering said complaint, and as a separate and additional defense thereto, this defendant alleges:

1. That prior to the failure of the National City Bank E. J. Groesbeck, as treasurer of Salt Lake County, designated said National City Bank as a depository of funds held by him as Treasurer of Salt Lake County; that as a condition for depositing such funds the said Groesbeck required the National City Bank to secure him against loss of any and all funds so deposited; that thereupon said National City Bank for the purpose of securing such funds as might be deposited by said E. J. Groesbeck, as such treasurer, delivered to said Groesbeck $360,000.00 par value of bonds of the Crystal Lake Farms Company, and in addition thereto procured and

24 delivered to said Groesbeck three certain depository surety bonds, the aggregate penalties of which amounted to the sum of $225,000.00; that one of said depository bonds in the sum of $125,000.00 so furnished by the bank to said Groesbeck as treasurer, was executed by the National Surety Company of New York, plaintiff herein, another of said depository bonds in the sum of $75,000.00 so procured by the bank and delivered to said Groesbeck as treasurer, was executed by the Fidelity and Deposit Company of Maryland; the other of said depository bonds in the amount of $25,000.00 so procured by said bank and delivered to said Groes-

beck as treasurer, was executed by the Massachusetts Bonding and Insurance Company.

2. That each and all of the said depository bonds ran to E. J. Groesbeck as treasurer of Salt Lake County, obligee.

3. That said E. J. Groesbeck as such treasurer did from time to time subsequent to the furnishing of such depository bonds and prior to the failure of said National City Bank deposit large sums of money in said bank; that the amount of money in said bank to the credit of said Groesbeck as treasurer at the time of the failure of said bank was the sum of $643,094.29.

4. That upon the failure of said bank, and on the 3rd day of February, 1922, this answering defendant was by the Comptroller of Currency of the United States duly and regularly appointed receiver of the said National City Bank and ever since said time has been and now is receiver of said bank.

5. That upon the falure of said bank and upon an inventory of its assets it became apparent that the assets of said bank were insufficient to pay the depositors of said bank including said E. J. Groesbeck as treasurer of Salt Lake County. Thereupon the said Groesbeck, as treasurer of Salt Lake County, made demand upon the National Surety Company, plaintiff herein, upon the Fidelity and Deposit Company of Maryland, and upon the Massachusetts Bonding and Insurance Company for payment to him as such treasurer of the full penalties of their depository bonds.

6. That the Fidelity and Deposit Company of Maryland paid the penalty of its bond, to-wit, $75,000.00 and thereupon demanded of said Groesbeck an assignment to it of his claim against the said National City Bank and your defendant as receiver in the sum of $75,000.00; that there was a special subrogation and assignment provision in the depository bond furnised by the said Fideity and Deposit Company of Maryland by reason of which the said E. J. Groesbeck as treasurer and this defendant as receiver recognized the right of the Fidelity and Deposit Company of Maryland to such assignment, in consequence of which this defendant issued his receiver's certificate to the Fidelity and Deposit Company of Maryland in the sum of $75,000.00, thereby reducing the claim of E. J. Groesbeck as treasurer against this defendant as receiver from the sum of $643,094.29, to the sum of $568,094.29.

7. That the National Surety Company of New York, plaintiff herein, offered to pay to E. J. Groesbeck as treasurer the full penalty of its depository bond, to-wit, $125,000.00 but demanded in consideration therefor that said Groesbeck as treasurer likewise assign to it his claim against the said bank and this defendant as its receiver in the sum of $125,000.00; that said E. J. Groesbeck as treasurer refused to accept payment upon such condition and demanded of the plaintiff herein, National Surety Company of New York, an unconditional payment of the full penalty of its depository bond; that on or about the 1st day of April, 1922, a meeting was held at the office of Arthur E. Moreton, Attorney for plaintiff, National Surety Company of New York, at which meeting said National Surety Company of New York, and the American Surety Company of New York, the Fidelity and Deposit Company of Maryland, the Massachusetts Bonding and Insurance Company and this defendant were all represented by their attorneys; that at such meeting the relative rights of all of the surety companies there represented in and to the assets of said National City Bank were discussed and it was agreed by all the parties there present, including the attorney for the plaintiff herein, National Surety Company of New York, that only the Fidelity and Deposit Company of Maryland was entitled to a pro tanto assignment of Groesbeck's claim against the bank until said Groesbeck as
26 treasurer had been made whole by funds received from the depository surety companies and from the receivership estate and the proceeds of Crystal Lake Farm bonds, or otherwise.

8. That thereupon defendant, as receiver, issued his receiver's certificate to E. J. Groesbeck as treasurer of Salt Lake County in the sum of $568,094.29, being the amount due from the defendant as receiver to said Groesbeck on account of his deposit in said bank, less the sum of $75,000.00 assigned by the said Groesbeck as treasurer to the Fidelity and Deposit Company of Maryland.

9. That thereafter during the course of the liquidation of said bank and its assets, this defendant accumulated large sums of money and was directed from time to time by the Comptroller of Currency of the United States to pay dividends to the Depositors of said bank; that on or about the 7th day of September 1922 a dividend of 20% was paid to the depositors of said bank; that the 20% paid to E. J. Groesbeck as treasurer and holder of said certificate amounted to $113,618.84; and that thereafter and on or about the 27th day of

February, 1923, this defendant issued and paid to the creditors of said banks a further dividend of 10%, and the 10% paid to said Groesbeck, holder of said certificate, amounted to $56,809.42.

10. That when said E. J. Groesbeck was elected Treasurer of Salt Lake County, Salt Lake County required that he furnish to it a surety bond in the sum of $200,000.00, conditioned upon his safely keeping and repaying to said County all moneys coming into his hands as treasurer of said County; that said Groesbeck procured the bond of the American Surety Company of New York in the sum of $200,000.00 and delivered the same to Salt Lake County; that upon the failure of said National City Bank said County made demand upon Groesbeck as treasurer for the return of all moneys which had come into his hands, and which had by him been deposited in said National City Bank; that said Groesbeck was unable to return said moneys to said Salt Lake County, whereupon said County made demand upon the American Surety Company for the full penalty of its bond; that thereafter and on or about the 15th day of February, 1924, said
27 American Surety Company paid to Salt Lake County the full amount of said bond, to-wit, the sum of $200,000.00, together with interest thereon amounting to $23,362.13.

11. That on or about the 15th day of February, 1924, by reason of the payment of dividends accruing from defendant's trust as receiver of said bank and by reason of the payment by the depository sureties before referred to of the sum of $225,000.00, and by reason of the payment of said County by the American Surety Company of the sum of $200,000.00, $595,428.28 had been repaid to Salt Lake County out of a total of $643,094.29 entrusted to said E. J. Groesbeck as treasurer and by him deposited in said National City Bank.

12. That on or about the 5th day of October, 1923, this defendant as receiver declared a dividend of 10% to all depositors of said bank, and announced his intention of paying the sum of $56,809.42, being 10% of the amount of the receiver's certificate held by Groesbeck, to said Groesbeck as treasurer of Salt Lake County. Thereupon the American Surety Company served notice upon this defendant that by reason of its obligation to pay the sum of $200,000.00 to Salt Lake County as surety upon the bond of E. J. Groesbeck as treasurer, and by reason of the fact that only $47,000.00 was required to make Salt Lake County whole on account of the

moneys entrusted to Groesbeck as treasurer, that it, said American Surety Company, was entitled to be paid the difference between $56,809.42 and $47,666.01, and said American Surety Company served further notice upon this defendant that it claimed the right to receive all further dividends accruing in the future on account of said certificate held by said E. J. Groesbeck, until such time as it, said American Surety Company, should be made whole on account of its payment of the sum of $200,000.00 and interest to Salt Lake County.

13. That at the same time said American Surety Company made said demand upon this defendant the National Surety Company of New York and the Massachusetts Bonding and Insurance Company, depository sureties as above set forth, notified this defendant that when Salt Lake County had been made whole on account of the moneys en-
28 trusted to Groesbeck as treasurer and by him deposited in the National City Bank, they, the National Surety Company of New York and the Massachusetts Bonding and Insurance Company, were entitled to receive dividends from the defenadnt as receiver before such time as the American Surety Company or E. J. Groesbeck as treasure had been made whole.

14. This defendant further alleges that upon receipt of said notice from the National Surety Company of New York and the Massachusetts Bonding & Insurance Company, he refused to pay over said dividend amounting to $56,809.42 to E. J. Groesbeck and the American Surety Company as demanded by them; that thereupon Salt Lake County, E. J. Groesbeck as treasurer of Salt Lake County, and the American Surety Company brought a suit in this court against this defendant as receiver wherein they prayed that this court required this defendant to pay over said 10% dividend as follows, to-wit: $47,666.01 to Salt Lake County and the balance of $9,143.41 to E. J. Groesbeck, treasurer, and that this court order and direct this defendant to pay all future dividends accruing on account of the deposit in the National City Bank made by said Groesbeck as treasurer until such time as said Groesbeck as treasurer and the American Surety Company as surety might be made whole.

15. That plaintiffs in said action served summons upon this defendant and thereupon this defendant filed in this court his bill of interpleader, wherein he set forth the conflicting claims of plaintiffs in said action and the National

Surety Company and the Massachusetts Bonding and Insurance Company, and the American Indemnity Company, the last named company being a reinsurer of the National Surety Company, and this defendant prayed that this court order the National Surety Company, the Massachusetts Bonding and Insurance Company and the American Indemnity Company to appear in said action and set up their claims if any to said dividend and to such dividends as might thereafter accrue.

16. This defendant alleges that pursuant to said prayer of this defendant in his bill of interpleader, this court did direct the National Surety Company, the Massa-
29 chusetts Bonding and Insurance Company and the American Indemnity Company to appear in said action and set up their claims if any to said dividend and to such other and further dividends as might thereafter accrue.

17. That the National Surety Company, the Massachusetts Bonding and Insurance Company, and the American Indemnity Company pursuant to said order of this Court, appeared in said action and filed their sworn answers and complaints in intervention; that said National Surety Company in its said complainant in intervention so filed in said action under oath alleged that it was entitled to participate in said dividends pro tanto with the American Surety Company and E. J. Groesbeck by reason of its alleged right to subrogation, and said National Surety Company in paragraph 12 of its verified answer and complaint in intervention set forth the following

"That the said National City Bank in its written application to this defendant for said depository bond in the sum of $125,000.00, and as a consideration for the issuance of said bond, promised and agreed to hold the said National Surety Company harmless, and to indemnify and reimburse it for any loss which it might sustain by reason of its execution of said bond and following its payment to Salt Lake County of the penalty of said bond in the sum of $125,000.00, the National Surety Company duly presented its claim in said amount arising out of said bond to said defendant receiver."

18. That in its prayer at the end of said answer and complainant in intervention said National Surety Company among other things prayed as follows:

"That the claim of the National Surety Company against said defendant receiver in the sum of $125,000.00 arising out of the promise and agreement of said National City Bank to indemnify and to hold said National Surety Company harmless and to reimburse it for any loss on account of its execution of said bond in the sum of $125,000.00 be allowed and approved, and the defendant receiver ordered to pay to said National Surety Company dividends thereon."

19. That upon the filing of said sworn answer and complaint in intervention, including the allegations hereinbefore referred to, the American Surety Company and E. J. Groesbeck as plaintiffs answered said complaint in intervention of said National Surety Company and denied that said National Surety Company was entitled to participate in said dividends either by reason of any alleged subrogation or by reason of any alleged right to direct indemnity; that the issue thus joined was tried before this court and a judgment entered in said action wherein it was adjudged that the National Surety Company was not entitled to participate in the assets of said Bank until said E. J. Groesbeck as treasurer and the American Surety Company as surety had been made whole, and it was further adjudged and decreed that the National Surety Company was not entitled either by reason of any alleged subrogation or by reason of any alleged right to direct indemnity to compete or participate with said Groesbeck or said American Surety Company in said dividends until such time as E J. Groesbeck as treasurer and the American Surety Company as surety had been made whole.

20. That an appeal from said judgment of the Court was taken by the National Surety Company to the Circuit Court of Appeals of the United States for the Eighth Circuit; that said matter was submitted upon printed briefs and oral arguments to the Circuit Court of Appeals of the United States for the Eighth Circuit and that in said Circuit Court of Appeals the National Surety Company did in said action insist and rely upon its right to participate by reason of its alleged right to direct indemnity; that said Circuit Court of Appeals after a hearing of said cause affirmed the judgment and decree of this court theretofore entered in said action and this defendant alleges that the claim of the plaintiff herein, National Surety Company, was in said former action fully adjudged and settled.

21. Defendant further alleges that upon the commencement of the trial of said cause the National Surety Com-

pany by its attorney of record in open court stipulated that Salt Lake County as plaintiff in that action was entitled to have and receive from Edward E. Jenkins as receiver, defendant in that action, the sum of $47,666.01 before it, the National Surety Company, was entitled to have and receive anything from said Edward E. Jenkins as receiver; that said stipulation, so made and entered in said cause, is wholly inconsistent with the claim now attempted to be set up by plaintiff in his complaint herein to the effect that
31 it was at all times entitled to direct indemnity.

22. Defendant further alleges that by reason of the acts and conduct of plaintiff as herein set out, it is now estopped and debarred from asserting that it is entitled to have or receive dividends from defendant until said E. J Groesbeck as treasurer and said American Surety Company as surety have been made whole and reimbursed in full.

23. Defendant alleges that the receiver's certificate so issued to Groesbeck as treasurer in the sum of $568,094.29 is still outstanding and a claim against this defendant; that there has been paid by this defendant on account of said certificate the sum of $340,856.52; that there has been paid to Groesbeck as treasurer on account of the indebtedness evidenced by such certificate the sum of $125,000.00 by the National Surety Company of New York, plaintiff herein, and the sum of $25,000.00 by the Massachusetts Bonding and Insurance Company; that there is still due and owing to the said Groesbeck as treasurer and the American Surety Company of New York, his surety, on account of said receiver's certificate, the sum of $227,237.77.

24. This defendant further alleges that he has been able to pay to depositors of said bank up to date only 60% of their claims; that in his best judgment he will not be able to pay more than 15% additional in dividends; that the bonds of said Crystal Lake Farms Company are worthless in defendant's opinion, and no money has been or can be realized therefrom; that he verily believes there will be a loss of about 25% to the depositors of said National City Bank; that it will require all of said 15% which defendant hopes to realize out of the remaining assets of said bank plus the entire amount of said depository bonds to make said Groesbeck as treasurer and said American Surety Company, his surety, whole on account of said deposit and said outstanding receiver's certificate.

25. Defendant alleges that in order to pay a 10% dividend to depositors it is necessary to have on hand the sum of $158,382.03; that if defendant is able to pay 15% more by way of dividends to creditors he will have to realize from the assets on hand the sum of $237,573.04; that he verily believes that he can not realize from said assets in excess of said sum; that if he is able to realize said sum he will declare a 15% dividend on account of said receiver's certificate so held by said Groesbeck as treasurer and said American Surety Company, which dividend will amount to the sum of $85,214.13; that said dividend when declared will fully pay and reimburse said Groesbeck as treasurer and said American Surety Company; that if this court should order that plaintiff herein National Surety Company, is entitled to participate pro rata in the assets of said bank, defendant alleges that the Massachusetts Bonding and Insurance Company, which company is in the same relation to this defendant and the assets of said bank as the plaintiff National Surety Company is, would also be entitled to participate in said assets of said bank and the defendant will be required at once to pay 60% of $125,000.00 or the sum of $75,000.00 to plaintiff and will be required to pay 60% of the sum of $25,000.00 or $15,000.00 to the Massachusetts Bonding and Insurance Company; that if an additional 15% is realized from the assets of said bank and plaintiff should prevail in this action, this defendant would have to include the plaintiff, National Surety Company, and the American Surety Company in his distribution of said 15% as a result of which the said Grosbeck as treasurer and the American Surety Company, as surety, would remain unpaid to the extent of $31,804.23, whereas the plaintiff, National Surety Company, and the Massachusetts Bonding & Insurance Company would be reimbursed on their said depository bonds of $125,000.00 and $25,000.00 respectively in the sums of $85,000.00 and $17,000.00 respectively; and this defendant alleges that when the plaintiff herein executed and furnished its depository bond to the said E. J. Groesbeck, as treasurer, it therein and thereby undertook and agreed to protect said Groesbeck as treasurer, against any loss on account of his deposit in said bank to the amount of the full penalty of its said bond, and that if plaintiff, National Surety Company, should be adjudged to be now entitled to participate or compete with said Groesbeck in the
33 distribution of the assets of said bank, said plaintiff would be freed from a substantial part of the obligation of its said bond, to the damage and injury of said

Groesbeck and to the damage and injury of the other depositors of said bank.

26. Defendant alleges that he is informed and believes and upon that ground alleges that said Groesbeck as treasurer has assigned and conveyed to the American Surety Company of New York the said receivership certificate for $568,094.29, above referred to, and has assigned and conveyed to said American Surety Company all his right title and interest in and to said bonds of the Crystal Lake Farms Company; that said E. J. Groesbeck as treasurer, of Salt Lake County, and the American Surety Company of New York as surety, are interested in the issues raised by plaintiff's complaint and defendant's answer, and a full and final adjudication of the issues raised thereby can not be made unless the said Groesbeck and the said American Surety Company are made parties to this action, and required to set up their claim, if any, in and to the assets of said bank, now in the possession of defendant as receiver.

Wherefore, defendant prays that an order of this court issue to E. J. Groesbeck, treasurer of Salt Lake County, and to the American Surety Company of New York, requiring said E. J. Groesbeck and said American Surety Company of New York to appear before this court and set up their claims if any to the assets of the National City Bank of Salt Lake City, Utah, now held and possessed by defendant as receiver;

That having fully answered plaintiff's complaint on file herein, this court enter its judgment and decree that plaintiff take nothing by reason of its said complaint;

Defendant prays for such other and further relief as to this court may be deemed just and equitable.

BAGLEY, JUDD & RAY,
Attorneys for Defendant.

34 State of Utah
County of Salt Lake—ss.

Edward E. Jenkins, being first duly sworn, on oath deposes and says:

That he is the receiver of the National City Bank of Salt Lake City, Utah, and the defendant in the above entitled action;

That he has read the foregoing answer, knows the contents thereof and that the same is true of his own knowledge, ex-

cept as to matters therein stated on information and belief, and as to such matters he believes it to be true.

EDWARD E. JENKINS

Subscribed in my presence and sworn to before me this 13 day of October 1925.

A. H. NEBEKER
Notary Public
(Seal) Rescidence: Salt Lake City, Uta.h

Copy of the foregoing Answer received this 15th day of October, 1925.

ARTHUR E. MORETON
Attorneys for Plaintiff.

Filed in United States District Court District of Utah Oct 15 1925 John W. Christy, Clerk.

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35 Order Interpleading American Surety Company and E. J. Groesbeck as Defendants,

Plaintiff herein having heretofore filed its verified complaint wherein it seeks to recover against the defendant a judgment for the sum of $120,000.00 and wherein it prays for a judgment of this court directing the defendant to accept and approve its claim as a creditor against the defendant, and the defendant herein having filed his verified answer wherein he sets forth certain facts wherefrom it apears that E. J. Groesbeck, as Treasurer of Salt Lake County, Utah, and the American Surety Company of New York, a corporation have an interest or claim an interest in the subject matter of the above entitled suit; and whereas defendant prays that this court make its order directing the said E. J. Groesbeck and said American Surety Company to appear in said action and set for their claim or claims, if any, to the subject matter of said action; and, whereas, defendant's demurrer to plaintiff's complaint has heretofore been presented to this court and this court has heard the statement of counsel for the parties thereon from which statement it appears to this court that E. J. Groesbeck Treasurer of Salt Lake County, and the American Surety Company should be made parties to such action,

Now, Therefore, it is hereby Ordered that E. J. Groesbeck, as Treasurer of Salt Lake County, and the American Surety Company of New York, a corporation, appear in this
36 action and set forth their claims, if any, to the property subject of said action.

It is Ordered that a certified copy of this order be served upon E. J. Groesbeck, Treasurer of Salt Lake County, and the American Surety Company of New York, a corporation, by the United States Marshal, and that within ten days after the service thereof upon each of said parties, that they appear herein pursuant to this order and set forth their claim or claims, if any, to the property the subject matter of this action.

(Signed) TILLMAN D. JOHNSN
Judge.

Dated this 17th day of October, 1925.

Filed in United States District Court, District of Utah, Oct. 17, 1925. John W. Christy, Clerk.

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37 Amended Answer of Interpleaded Defendants E. J. Groesbeck and American Surety Company.

Come now E. J. Groesbeck and the American Surety Company of New York, a corporation, interpleaded herein, and for answer to plaintiff's complaint, admit, deny and allege as follows:

I.

These interpleaded defendants admit the allegations of paragraphs 1, 3, 4 and 5 of the said complaint.

II.

Answering paragraph 2 of the said complaint, these interpleaded defendants admit that the National City Bank of Salt Lake City, Utah, was until its failure on or about the 17th day of January, 1922, a national banking association organized and existing under the national banking act, and conducting a general banking business at Salt Lake City, Utah.

III.

Answering paragraph 6 of the said complaint, these interpleaded defendants admit and allege that under the laws of the State of Utah, to-wit, Sec. 4500 Compiled Laws of Utah, 1917, a county treasurer is authorized to deposit the public funds in his custody in a bank chosen by him provided that he comply with said section which requires that he take collateral security or a good and sufficient surety company bond or personal bond approved by him sufficient in amount to protect such funds.

38 Answering paragraphs 7 and 8 of said complainant, these interpleaded defendants admit and allege that the

plaintiff, on or about the 3rd day of January, 1921, as surety, and the National City Bank of Salt Lake City as principal, executed and delivered to E. J. Groesbeck, County Treasurer of Salt Lake County, its depository bond in the sum of $125,000.00, in the form of Exhibit "B" to the complaint, in connection with and as an inducement for the deposit of County funds in said National City Bank of Salt Lake City by the said E. J. Groesbeck as County Treasurer of Salt Lake County.

V.

Answering paragraph 9 of the said complaint, these interpleaded defendants admit and allege that between the 3rd day of January, 1921, and the 17th day of January, 1922, the said E. J. Groesbeck did, from time to time, make deposits in said Bank of County funds; that on the 17th day of January, 1922, the said National City Bank of Salt Lake City closed its doors and suspended business; that after suspension of said bank certain items were charged back and the account of said E. J. Groesbeck was made to show a credit in his favor of $643,094.29; that said Groesbeck made demand upon the plaintiff for payment on account of its said bond in the sum of $125,000.00; that pursuant to said demand plaintiff paid to said E. J. Groesbeck as County Treasurer, the sum of $125,000.00, the penalty of its said bond.

VI.

Answering paragraph 10 of said complainant, there interpleaded defendants admit that said National Surety Company has assigned to the American Indemnity Company, a corporation of Galveston, Texas, $5000.00 of its alleged claim.

VII.

Answering paragraph 11 of said complainant, these interpleaded defendants admit that plaintiff filed with the Receiver of said National City Bank of Salt Lake City, an alleged claim, shown as Exhibit "C" to the complaint, based on its said indemnity agreement, but as to whether said claim was in proper form, or was filed in time, these defendants are not informed; these defendants admit that the said
39 Receiver has refused to pay to the plaintiff dividends on said alleged claim.

VIII.

Answering paragraph 12 of said complainant, these interpleaded defendants deny each and every allegation therein contained.

IX.

These interpleaded defendants deny each and every allegation in the said complaint contained not hereinbefore specifically admitted, denied or qualified.

Further answering the said complaint and by way of an affirmative defense thereto, these interpleaded defendants allege:

That on, to-wit, the 10th day of March, A. D. 1924, Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of Salt Lake County, and the American Surety Company of New York, as plaintiffs, instituted a suit in the above entitled court against Edward E. Jenkins, as Receiver of the National City Bank at Salt Lake City, Utah, a national banking association, for the purpose of compelling payment by the said Receiver to said Salt Lake County and E. J. Groesbeck, and his official surety, the American Surety Company of New York, of a dividend of ten per cent amounting to the su mof $56,809.42, and compelling said Receiver to pay all future dividends accruing on account of the deposit of County funds in the National City Bank of Salt Lake City, Utah, to the said Groesbeck as County Treasurer, until the said Groesbeck and his indemnified official surety, the American Surety Company of New York might be made whole; that in said action the National Surety Company, and the Massachusetes Bonding & Insurance Company were made parties by interpleader, and the plaintiff herein and said Massachusetts Bonding & Insurance Company appeared in said action and filed their sworn answers and complaint in intervention, and in its said answer and complaint in intervention the plaintiff herein set up the right to indemnity and reimbursement from said bank on account of the payment of the penalty of its bond in the sum of $125,000.00, which right is again asserted in this action, alleging that it had
40 duly presented its claim in said amount arising out of the payment of said bond, to the Receiver of said bank, and by its said answer and complaint prayed that its said claim against the Receiver of said bank in the sum of $125,000.00 arising out of the agreement of said bank to indemnify and reimburse it should be allowed and approved and that the defendant Receiver should be ordered to pay dividends thereon; that these interpleaded defendants answered said complainant in intervention and denied the right of said National Surety Company to participate in dividends either by way of subrogation or by reason of any alleged indemnity agree-

ment,, and the issue thus joined was presented to this Court; that on, to-wit, the 10th day of June, 1924, after trial on the merits of said issue, the above outlined court rendered judgment and decree in favor of the American Surety Company of New York in which it was decided and adjudged that said National Surety Company was not entitled to participate in the assets of said Bank until the American Surety Company of New York shall have received on account of dividends and /or proceeds of the Crystal Lake bonds, the total sum of $223,362.15, with interest on the principal sum of $200,000.00, and denied the identical claim now asserted by the plaintiff herein for reimbursement on account of said indemnity agreement; that thereafter the said National Surety Company, plaintiff herein, appealed from said judgment to the Circuit Court of Appeals of the United States for the Eighth Circuit; that it assigned error for failure of this Court to enter judgment in its behalf on the issue of its right to indemnity and reimbursement by reason of the alleged indemnity agreement sued upon in the present action; that it presented its argument in its printed brief to the said Circuit Court of Appeals on said point; that after decision of the said Circuit Court of Appeals upholding the judgment of the above entitled court, it again presented argument by way of motion for rehearing primarily on the issue of its right to indemnity and reimbursement by reason of the said application and indemnity agreement sued upon in the above entitled action that thereafter by way of petition for writ of certiorari to the United States Supreme Court, it again presented as its primary argument for such writ the issue of its right
41 to indemnity and reimbursement by reason of the application and indemnity agreement sued upon in the above entitled action; that its said petition for writ of certiorari to the United States Supreme Court was denied on the 27th day of October, 1925, and thereby the decision of the United States Circuit Court of Appeals for the Eighth Circuit affirming the decree of the above entitled court, and said decree, became and is final; that the issue sought to be again raised by the plaintiff in the above entitled action is res adjudicata; that said affirmed and final decree of this court in said cause of action between these parties is a conclusive bar to the present suit based on the same cause of action.

And by way of further answer and as a further defense, these interpleaded defendants further allege:

That when the said E. J. Groesbeck selected said National City Bank of Salt Lake City, Utah, in which to deposit County funds coming into his hands, he secured from said Bank a bond wherein it was principal and the National Surety Company was surety, whereby the Bank and its surety agreed in all respects to save and keep the said E. J. Groesbeck harmless and indemnified for and by reason of making said deposits; that nevertheless upon the failure of said Bank the American Surety Company of New York, surety on the official bond of said E. J. Groesbeck, was compelled to and did pay to Salt Lake County on account of the failure of said Bank and its inability to pay over County funds, the sum of $223,362.15; that the dividends already paid and to be paid on account of the deposit of E. J. Groesbeck as County Treasurer in said Bank and the other collateral security in the form of Crystal Lake bonds held by the American Surety Company of New York as assignee of said E. J. Groesbeck, will not be sufficient to fully reimburse said E. J. Groesbeck and his surety the American Surety Company of New York for the aforesaid payment; and that in any event these interpleaded defendants will sustain a loss by virtue of said deposit and the aforesaid payment made on the official bond; that to allow the claim of the said National Surety Company herein sued upon, would in effect increase the amount of such loss on the part of the said E. J. Groesbeck and the
42 American Surety Company of New York; that this Court and the Circuit Court of Appeals, by its affirmance of the decree heretofore rendered by this Court, have decided and determined conclusively as between all parties to this suit, that the National Surety Company is not entitled to receive any moneys or collateral from said Bank by way of subrogation or reimbursement or otherwise until its obligee E. J. Groesbeck and his assignee the American Surety Company of New York have been made whole; that the plaintiff herein is and ought to be estopped by reason of said former trial and litigation of this same issue and the decree of this Court and the affirmance of the Circuit Court of Appeals of the Eighth Circuit and by reason of its aforesaid contract of indemnity and guaranty to said E. J. Groesbeck from further prosecuting this case and from attempting to secure a part of the assets of said Bank at the expense of and to the detriment of its obligee and his assignee, before these interpleaded defendants have been made whole, by reason of said alleged indemnity agreement between plaintiff and the National City Bank of Salt Lake City to which agreement these interpleaded defendants were neither parties nor privies, and with

respect to whom said alleged indemnity agreement has no binding force or effect.

Wherefore: These interpleaded defendants pray that plaintiff may take nothing by reason of its complaint herein and that these defendants may be dismissed hence with their costs herein incurred, and for such other and further relief as may be proper.

CHENEY, JENSEN, MARTINEAU & STEPHENS,
Attorneys for E. J. Groesbeck and the American Surety Company of New York.

43 State of Utah,
County of Salt Lake—ss.

W. E. McKell being first duly sworn, deposes and says: That he is an officer of the Interpleaded defendant American Surety Company of New York, to-wit, its Resident Vice-President, and makes this verification for and on behalf of said corporation; that he has read the foregoing Amended Answer of Interpleaded defendants and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated upon information and belief, and as to such matters he believes it to be true.

W. E. McKELL.

Subscribed and sworn to before me this 1st day of December, 1925.

(Seal) ROSE SMITHEN,
Notary Public,
Residing at Salt Lake City, Utah.

Service of foregoing answer acknowledged this 1st day of December, 1925.

ARTHUR E. MORETON,
Atty. for Plaintiff.

BAGLEY, JUDD & RAY,
Attorneys for Def. Edward E. Jenkins.

Filed December 2, 1925, John W. Christy, Clerk.

44 **Plaintiff's Reply to Answer of Defendant Edward E. Jenkins**

Comes now the plaintiff National Surety Company, a corporation, and without waiving its Motion made herein to strike certain portions of the answer of the defendant Edward E. Jenkins, receiver, for its reply to the so-called separate and [addition] defense in said answer of the defendant Edward E. Jenkins, as receiver, admits, denies and alleges as follows:

1. Replying to paragraph 1 thereof, this plaintiff admits that the said National City Bank was designated as a depository of the funds of Salt Lake County and that thereafter the National City Bank procured and delivered to E. J. Groesbeck, as the Treasurer and representative of Salt Lake County, three depository surety bonds mentioned in said paragraph, and that said depository bonds, together with $360,000.00 par value of bonds of the Crystal Lake Farms Company, were delivered to said E. J. Groesbeck, treasurer, as the representative of Salt Lake County, pursuant to the provisions of Section 4500, of the Compiled Laws of Utah,
45 1917, which Section provides that if a public officer shall deposit public funds in any bank, he shall take from such depository good and sufficient collateral or surety bonds sufficient to fully protect the public funds so deposited by him.

2. Answering paragraph 2 thereof, this plaintiff admits and alleges that said depository bonds ran to E. J. Groesbeck "as treasurer of Salt Lake County" and were made to him as the agent and representative of said county and for the purpose of protecting the funds of said county so deposited by him and not otherwise.

3. Admits paragraph 3 thereof.

4. Admits paragraph 4 thereof.

5. Admits that upon the failure of said bank, that it became apparent that the assets of said bank were insufficient to pay the depositors, including the said deposit of Salt Lake County, in the sum of $643,094.29. Admits that demand was made upon the three surety companies executing said depository surety bonds, for the full penalties of their respective depository bonds, but alleges that said demand was made by Salt Lake County.

6. Admits that there was in the bond furnished by the Fidelity & Deposit Company of Maryland in the sum of $75,-

000.00, a special subrogation and assignment provision and that by reason thereof, Salt Lake County and the said defendant E. E. Jenkins as receiver, recognized the right of the Fidelity & Deposit Company of Maryland to such assignment and that thereupon Salt Lake County executed and delivered to said Fidelity & Deposit Company an assignment to $75,000.00 of said deposit, thereby reducing the claim of Salt Lake County against said defendant as receiver from the sum of $643,094.29 to the sum of $568,094.29. Further answering said paragraph, this plaintiff denies each and every other allegation therein contained.

7. Answering paragraph 7 thereof, this plaintiff alleges that it offered to pay to Salt Lake County the full penalty of its depository bond, to-wit, $125,000.00, and offered its check in said amount, upon condition that it be subrogated to the said county's claim upon said deposit to the amount of
46 said payment, but that Salt Lake County refused to accept said payment upon such condition and thereafter, on June 5, 1922, this plaintiff made payment of the same, pursuant to a resolution passed on or about June 5, 1922 by the Board of Commissioners of Salt Lake County, to the effect that said payment was received without prejudice to the claim of this plaintiff to subrogation pro tanto to the rights of said Salt Lake County against said National City Bank and its receiver. Further answering said paragraph, this plaintiff admits and alleges that sometime prior to April 1, 1922, a meeting was held at the office of Arthur E. Moreton, who was then and there acting in the capacity of attorney for Salt Lake County, at which meeting attorneys for the Fidelity & Deposit Company, American Surety Company, Massachusetts Bonding & Insurance Company and for the defendant receiver were present, and that at such meeting the relative rights of all the said surety companies there represented in and to the dividends on the deposit of Salt Lake County, were discussed informally and that at such meeting it was the [concensus] of opinion of the attorneys present that only the Fidelity & Deposit Company of Maryland was entitled to a pro tanto assignment of the claim of Salt Lake County against said bank and its receiver on account of said deposit, until said county had first been made whole by funds received from the depository surety companies and from the receivership estate and the proceeds of the Crystal Lake Farm Company bonds. That said National Surety Company, plaintiff herein, was not represented at said meeting. That said Arthur E . Moreton advised the Board of County

Commissioners of Salt Lake County of his said opinion in said matter and thereafter the said Board of County Commissioners, upon receipt of said sum of $75,000.00 from said Fidelity & Deposit Company of Maryland, made, executed and delivered to the latter its assignment of $75,000.00 of its said deposit, as aforesaid. Further answering said paragraph, this defendant denies each and every other allegation therein contained.

47 8. The plaintiff alleges that it has no knowledge or information sufficient to enable it to form a belief as to the allegations contained in paragraph 8, and therefore and upon that ground denies the same. Further answering said paragraph, this plaintiff alleges that if the said defendant receiver did issue his receiver's certificate to E. J. Groesbeck personally in the sum of $568,094.29, the same was and is wrongful, unlawful and void in violation of the rights of this plaintiff and that the said certificate should have been issued to Salt Lake County and should now be surrendered to and delivered up by said Groesbeck to the defendant receiver.

9. Admits the allegations of paragraph 9 thereof.

10. Admits the allegations of paragraph 10, and alleges that said bond further provided that the said Groesbeck would perform the duties of said office according to law.

11. Answering paragraph 11 thereof, this plaintiff admits that by reason of the payment by the three depository surety companies of the sum of $225,000.00, including the $125,000.00 paid by this plaintiff, and the payment to said County by the American Surety Company of $200,000.00, and dividends paid by said receiver, that said Salt Lake County has been repaid in full on account of its deposit in said bank. Further answering said paragraph, this plaintiff denies each and every other allegation therein contained.

12. Admits paragraph 12 thereof.

13. Admits paragraph 13 thereof.

14. Admits that the suit was brought by the American Surety Company and E. J. Groesbeck as alleged in paragraph 14 thereof.

15. Admits the allegations of paragraph 15 thereof.

16. Admits the allegations of paragraph 16 thereof.

17. Admits the allegations of paragraph 17 thereof.

18. Admits the allegations of paragraph 18, and alleges that in the prayer of its said answer in said prior action, this plaintiff National Surety Company prayed that it be
48 decreed that it be entitled by subrogation to its pro rata share of dividends then declared and held by the said defendant receiver, together with its pro rata share of all dividends thereafter declared, and that it have such other and further relief as might be just and equitable. Further answering said paragraph, this plaintiff alleges that said action referred to was instituted for the recovery of all the dividends accruing in the hands of said defendant receiver on the said deposit of Salt Lake County, that the subject matter of said action was said dividends and, as incidentally and collaterally bearing upon the rights of this plaintiff, National Surety Company, to subrogation and to priority in the distribution of said dividends upon said deposit, and to show the relation existing between it and the bank, there was offered by the National Surety Company and received in evidence, the said application for said bond and Indemnity Agreement herein sued upon. That at the trial of said case all the parties thereto agreed that there be paid to Salt Lake County the sum of $47,666.01 to make it whole, and thereupon it was stated to the Court by the attorneys for all the parties to said action, including the defendant receiver, E. J. Groesbeck and American Surety Company, that said action resolved itself solely into a contest between the surrety companies as to their respective rights to subrogation to the said dividends by reason of the payments made by each of them. The said action was thereupon, by consent of all the parties, transferred from the Law side of the court to the Equity side, and was tried as an equitable action, the subject matter thereof being solely the said dividends on said deposit. Thereupon it was stated by the Court at the trial of said action, that the said action was purely a contest between the surety companies as to priority in the payment of dividends by said receiver upon said deposit, to which statement all parties agreed, and said case was tried upon said theory, this plaintiff National Surety Company thereby striking from its answer, in effect, any claim against said receiver in said action for reimbursement based upon
49 said Indemnity Agreement. That the Court in said action, and all parties to said action, recognized the fact that said action was in fact one in rem concerning the disposition of the dividends in the receiver's hands and thereafter to accrue on said deposit, and no claim of any kind whatsoever was made or asserted by this plaintiff at said trial against said defendant receiver upon said In-

demnity Agreement herein sued upon, and that because of said statements to the court, hereinbefore referred to, and the limitations placed upon the subject matter of said action, the attorney for the said defendant receiver left the court room prior to the conclusion and final submission of said case, and the sole issue involved, to-wit, the respective rights of the surety companies to priority to said dividends, was argued by their respective counsel and the case was thereupon submitted to the court upon said issue.

19. Denies each and every allegation contained in paragraph 19 thereof. Further answering said paragraph, this plaintiff alleges that the only issue before said court in said action was the respective rights of the said surety companies to subrogation in and to the dividends upon said deposit, and that by said decree it was adjudged and decreed that this plaintiff National Surety Company was not entitled to be subrogated to the rights of Edward J. Groesbeck as treasurer of Salt Lake County to dividends on said deposit until the said American Surety Company should have received on account of said dividends and/or proceeds of the Crystal Lake Farm Company bonds, the sum of $223,362.15 with interest at the rate of eight per cent per annum on $200,000.00 thereof from February 29, 1924.

20. Answering paragraph 20 thereof, this plaintiff admits that it took an appeal from the judgment of the above entitled court to the Circuit Court of Appeals of the United States for the Eighth Circuit, and that said Circuit Court of Appeals affirmed the said judgment and decree of this court therefore entered in said action. Further answering said paragraph, this plaintiff denies each and every other allegation therein contained.

50 21. Answering paragraph 21 thereof, this plaintiff admits that in said action it stipulated that Salt Lake County was entitled to have and receive from Edward E. Jenkins as receiver, the sum of $47,666.01 of said dividend before it, the said plaintiff, was entitled to subrogation to the dividends declared or to be thereafter paid upon said deposit by said defendant receiver. Further answering said paragraph, this plaintiff denies each and every other allegation therein contained. Further answering said paragraph, this plaintiff alleges that said action was instituted by the said American Surety Company and E. J. Groesbeck for the purpose of obtaining a decree to the effect that they had a prior or preferential right to subrogation to the dividends then in the defendant receiver's hands and thereafter to be

declared by him; that the subject matter of said action was said dividends and that upon the request of the said defendant receiver, the Court issued its order requiring this plaintiff to appear and set forth its claim to dividends upon said deposit. That such an order was made and this plaintiff filed its answer, setting forth its claim for subrogation and claiming a right to priority over said American Surety Company in the distribution of said dividends, and, as incidentally and collaterally bearing upon its rights to subrogation to said dividends, it set forth in said answer the Indemnity agreement herein sued upon. This plaintiff further alleges that in said action no issue was joined between the plaintiff National Surety Company and said defendant or either of them, upon the right of this plaintiff National Surety Company to have its claim against said receiver, arising out of said Indemnity Agreement, allowed and approved and the receiver directed to pay dividends thereon; that the parties hereto stated to the court that the sole and only question in issue was the respective rights of the American Surety Company, National Surety Company and Massachusetts Bonding & Insurance Company to priority in the distribution of said dividends, and said case was tried and determined by the Court upon said issues and said theory; that the decree
51 made and entered by this court in said action. adjudicated only the respective rights of the several surety companies hereinbefore mentioned to priority in the distribution of dividends upon said deposit of the funds of Salt Lake County made by E. J. Groesbeck as aforesaid, and those rights only.

22. Denies each and every allegation contained in paragraph 22 thereof.

23. Answering paragraph 23 thereof, this plaintiff alleges that if the said defendant receiver issued to said Groesbeck as treasurer a receiver's certificate in the sum of $568,094.29 or any other sum, the same was issued wrongfully and unlawfully and without authority of law and the same is void and should be surrendered up by said Groesbeck to said defendant receiver for cancellation, and admits that the said National Surety Company has paid to Salt Lake County on account of said deposit the full penalty of its bond in the sum of $125,000.00, as alleged in its complaint herein. Further answering said paragraph, this plaintiff denies each and every other allegation therein contained.

24. This plaintiff alleges that it has no knowledge or information sufficient to enable it to form a belief as to the

truth of the allegations contained in paragraph 24 of said answer, and therefore and upon that ground denies each and every allegation therein contained.

25. Answering paragraph 25 thereof, this plaintiff admits and alleges that it executed its depository bond as alleged in its complaint herein and thereby undertook and agreed to protect and indemnify Salt Lake County against the loss of its funds deposited in said National City Bank to the amount of the penalty of its said bond, to-wit, the sum of $125,000.00, upon the express condition that the said treasurer would require the said National City Bank, if more than the sum of $125,000.00 was deposited in said bank, to furnish additional corporate surety bonds or collateral in an amount fully sufficient to protect the funds so de-
52 posited, as provided by Section 4500 Compiled Laws of Utah 1917. That the said Treasurer Groesbeck deposited in said National City Bank more than the sum of $125,000.00 and had in said bank at the time of its failure, $643,094.29, and as security from the said bank, had received from it only the sum of $225,000.00 in corporate surety bonds and $360,000.00 par value of Crystal Lake Farm Company bonds, which bonds were and are wholly insufficient to protect the funds of Salt Lake County so deposited by said treasurer, and that as a result thereof, the said E. J. Groesbeck and the surety on his official bond, the said American Surety Company, were obliged to pay to Salt Lake County the penalty upon the official bond of said treasurer in the sum of $200,000.00. That had the said Groesbeck required and taken from said bank sufficient protection to fully protect the said deposit, as provided by said Section 4500 Compiled Laws of Utah 1917, neither he nor his surety would have snffered any loss on account of said deposit. Further answering said paragraph, this plaintiff alleges that it has no information or knowledge sufficient to enable it to form a belief as to the truth of the other allegations contained in said paragraph, and therefore and upon that ground denies each and every other allegation therein contained.

26. Answering paragraph 26 of said answer, this plaintiff denies each and every allegation therein contained.

27. Further replying to the so-called separate and additional defense contained in said answer, this plaintiff denies generally and specifically each and every other allegation therein contained.

Wherefore, the plaintiff prays for judgment as set forth in its complaint herein.

A. E. MORETON
Attorney for Plaintiff.

53 State of Utah,
County of Salt Lake—ss.

Arthur E. Moreton, being first duly sworn on oath, deposes and says that he is the attorney for the National Surety Company, the Plaintiff in the above entitled action; that he has read the foregoing reply to the answer of the defendant receiver, knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to such matters he believes it to be true. This affidavit is made by affiant for the reason that there are at this time no general officers of the said National Surety Company within the State of Utah, nor is there within the said State of Utah any agent of said National Surety Company as familiar with the facts set forth in said reply as is this affiant.

ARTHUR E. MORETON.

Subscribed and sworn to before me this 30th day of November, 1925.

RAY VAN COTT
(Seal) Notary Public
Residing at Salt Lake City, Utah.

My Commission expires March 12, 1927.

Service admitted and copy received of the foregoing reply this 30th day of Novmber, 1925.

BAGLEY, JUDD & RAY
Attorney for Defendant

E. E. JENKINS,
Receiver.

CHENEY, JENSEN, MARTINEAU & STEPHENS,
Attorneys for American Surety Company and E. J. Groesbeck.

Filed in United States District Court, District of Utah, Dec. 2, 1925, John W. Christy, Clerk.

54 Plaintiff's Motion To Strike From Answer of E. J. Groesbeck and American Surety Company

Comes now the plaintiff, National Surety Company, and moves to strike from the answer of E. J. Groesbeck and American Surety Company of New York, interpleaded defendants herein all that portion of the said answer beginning on the 11th line from the bottom of page five thereof, with the words "That the dividends already paid" and ending with the conclusion of said paragraph, for the reason that the matters and things therein set forth are material, sham and frivolous and argumentative.

A. E. MORETON,
Attorney for plaintiff.

Copy received this 30th day of November, 1925.

CHENEY, JENSEN, MARTINEAU & STEPHENS,
Attorneys for defendants, E. J. Groesbeck and American Surety Company.

Filed in United States District Court, District of Utah. Dec. 2, 1925, John W. Christy, Clerk.

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55 Plaintiff's Motion to Strike From Answer of Defendant Receiver.

Comes now the plaintiff, National Surety Company, and moves to strike from the answer of the defendant receiver, the following portions of said answer, to-wit:

1. Paragraph 23 thereof.
2. Paragraph 24 thereof.
3. Paragraph 25 thereof.

for the reason that the matters and things therein set forth are immaterial, sham and frivolous and argumentative.

A. E. MORETON,
Attorney for Plaintiff.

Copy received this 30th day of November, 1925.

BAGLEY, JUDD & RAY
Attorney for Defendant

E. E. JENKINS,
Receiver.

Filed in United States District Court of Utah Dec. 2, 1925, John W. Christy, Clerk.

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56 Plaintiff's Reply to Answer of Interpleaded Defendants American Surety Company and E. J. Groesbeck.

Comes now the plaintiff National Surety Company, a corporation, and, without waiving its Motion made herein to strike certain portions of the answer of the American Surety Company and E. J. Groesbeck, for its reply to the so-called affirmative defense in said answer of E. J. Groeebeck, and American Surety Company of New York, a corporation, defendants interpleaded herein, admits, denies and alleges as follows:

1. Admits that on or about the 10th day of March, 1924, Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of Salt Lake County, and the American Surety Company of New York, as plaintiffs, instituted a suit in the above entitled court against Edward E. Jenkins as Receiver of the National City Bank of Salt Lake City, a National Banking Association, for the purpose of compelling payment by the said Receiver to Salt Lake County and E. J. Groesbeck and his official surety, the
57 American Surety Company of New York, of a dividend of ten per cent amounting to the sum of $56,809.42 and for the further purpose of compelling said receiver to pay all future dividends accruing on account of the deposit of county funds in the National City Bank of Salt Lake City, Utah, to the said Groesbeck as county treasurer.

2. Plaintiff alleges that the said E. E. Jenkins, receiver of said bank, defendant in said action and defendant in this action, tendered said dividend of $56,809.42 into the above entitled court and in his answer prayed that the said court make its order requiring this plaintiff, National Surety Company, to appear and set forth its right to said dividend of $56,809.42 and such future dividends as might ac-

crue and come into his possession by reason of the said deposit by Salt Lake County of said funds in said National City Bank.

3. Admits that in said action the National Surety Company and the Massachusetts Bonding & Insurance Company were made parties defendant by order of interpleader of the above entitled court, of date March 28, 1924, and by such order were directed by the above entitled court to show cause, if any they had, why the said dividend of $56,809.42 should not be forthwith paid to said plaintiffs.

4. That pursuant to said order of interpleader, this plaintiff, National Surety Company, filed an answer in said action above mentioned, setting forth its claim for subrogation to its pro rata share of the said dividend of $56,809.42 then declared in the hands of said defendant receiver, together with its pro rata share of all dividends to be thereafter declared by the said receiver. That in its said answer in said action, this plaintiff National Surety Company claimed a right to priority over said American surety Company in the distribution of the dividends in the hands of and to be hereafter paid by the receiver of said bank, and as incidentally and collaterally bearing upon its right to subrogation to said dividends, it set forth in said answer the said Indemnity Agreement herein sued upon. This plaintiff further alleges that in said action no issue was joined
58 or tried between this plaintiff National Surety Company and said defendant receiver upon the rights of this plaintiff National Surety Company to have its claim against said receiver, arising out of said Indemnity Agreement, allowed and approved and the receiver directed to pay dividends thereon, and that the sole and only question before the above entitled court in said other action, and the sole and only question that was there in issue or therein adjudicated, were the respective claims of the surety companies to priority in the said dividend of $56,809.42 and further dividends to accrue in the hands of said defendant receiver on account of said deposit.

5. That the subject matter of said action was said dividends, and as incidentally and collaterally bearing upon the rights of this plaintiff National Surety Company to priority in the distribution of said dividends upon said deposit, and to show the relation existing between it and the bank, there was offered by the National Surety Company and re-

ceived in evidence, the said application for said bond and Indemnity Agreement herein sued upon. That at the trial of said case all the parties thereto agreed that there be paid to Salt Lake County the sum of $47,666.01 from said dividend to make it whole, and thereupon it was stated to the Court by the attorneys for all the parties to said action, including the defendant receiver, E. J. Groesbeck and American Surety Company, that said action resolved itself solely into a contest between the surety companies as to their respective rights to subrogation to the said dividends by reason of the payments made by each of them. The said action was thereupon, by consent of all the parties, transferred from the Law side of the court to the Equity side, and was tried as an equitable action, the subject matter thereof being solely the said dividends on said deposit. Thereupon it was stated by the Court at the trial of said action, that the said action was purely a contest between the surety companies as to priority in the payment of dividends by said receiver upon said deposit, to which statement all parties agreed, and said case was tried upon said
59 theory, this plaintiff National Surety Company. thereby striking from its answer, in effect, any claim against said receiver in said action for reimbursement based upon said Indemnity Agreement. That the Court in said action, and all parties to said action, recognized the fact that said action was in fact one in rem concerning the disposition of the dividends in the receiver's hands and thereafter to accrue on said deposit, and no claim of any kind whatsoever was made or asserted by this plaintiff at said trial against said defendant receiver upon said Indemnity Agreement herein sued upon, and that because of said statements to the court, hereinbefore referred to, and the limitations placed upon the subject matter of said action, the attorney for the said defendant receiver left the court room prior to the conclusion and final submission of said case, and the sole issue involved, to-wit, the respective rights of the surety companies to priority to said dividends, was argued by their respective counsel and the case was thereupon submitted to the court upon said issue.

6. Further replying to said affirmative matter in said answer, this plaintiff National Surety Company admits that on the 10th day of June, 1924, the above entitled court made and rendered its judgment and decree in said action above referred to in favor of the American Surety Company of New York, in which it was decided and adjudged that the National

Surety Company was not entitled to participate in the said dividends declared and to be declared by the said Receiver on the said deposit of Salt Lake County, and/or proceeds of the Crystal Lake Farms Company bonds, until the American Surety Company schould have received the sum of $323,362-15, with interest on the principal sum of $200,000.00; and that thereafter the National Surety Company appealed from said judgment to the Circuit Court of Appeals of the United States for the Eighth Circuit and that the decision of the above entitled court with reference to the right of the American Surety Company to be first repaid in full from the dividends on said deposit and/or the proceeds of the Crystal Lake Farm Company Bonds, was upheld by said Circuit
60 Court of Appeals and that said decree thereafter became and is final. Plaintiff further admits that it filed a Petition for Writ of Certiorari in the Supreme Court of the United States, praying that the decision in the said Circuit Court of Appeals be reviewed, and that said petition was denied.

7. Further replying to the so-called affirmative defense set forth in said answer of said interleaded defendant, this plaintiff denies that the issue now before the court was decided in said action above referred to and denies that the issues herein raised are res judicata by reason thereof.

8. Further replying to the so-called affirmative defense set forth i nsaid answer of said interpleaded defendants, this plaintiff denies generally and specifically each and every other allegation therein contained not hereinbefore specifically admitted, qualified or denied.

Wherefore, plaintiff prays for judgment against said defendant receiver as set forth in its complaint herein.

A. E. MORETON
Attorney for Plaintiff.

Filed in United States District Court District of Utah, Dec. 2 1925 ....., Clerk.

61 State of Utah,
County of Salt Lake——ss.

Arthur E. Moreton, being first duly sworn on oath, deposes and says that he is the attorney for the National Surety Company, the plaintiff in the above entitled action; that he has read the foregoing reply to the answer of defendants American Surety Company and E. J. Groesbeck, knows the

contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to such matters he believes it to be true. This affidavit is made by affiant for the reason that there are at this time no general officers of the said National Surety Company within the State of Utah, nor is there within the said State of Utah any agent of said National Surety Company as familiar with the facts set forth in said reply as is this affiant.

ARTHUR E. MORETON

Subscribed and sworn to before me this 30th day of November, 1925.

RAY VAN COTT
Notary Public
(Seal) Residing at Salt Lake City, Utah,

My Commission expires: March 12, 1927.

Service admitted and copy received of the foregoing reply this 30th day of November, 1925.

BAGLEY, JUDD & RAY
Attorney for Defendant
E. E. Jenkins, Receiver.

CHENEY, JENSEN, MARTINEAU & STEPHENS
Attorneys for American Surety Company and E. J. Groesbeck.

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62 (Order granting leave to Interpleaded Defendants to file Answer to Complaint, etc.)

December 2, 1925.

At this 2nd day of December, 1925, comes said plaintiff by A. E. Moreton, its attorney, and the said defendants by Paul H. Ray, and John Jensen, their attorneys, also come. And this cause coming on regularly for trial, by the Court, a jury having been waived in writing, on motion of the defendants, E. J. Groesbeck and American Surety Company, they are given leave to file their amended answer to the complaint, it being stipulated that the reply of plaintiff now on file shall

stand as reply to said amended answer. And Fred A. Moreton is sworn and examined as a witness, and certain documentary evidence admitted on the part of plaintiff, and plaintiff rests. And the motions of plaintiff filed herein to strike are submitted and by the Court denied. And on the part of defendants, Edward E. Jenkins, W. E. McKell and E. J. Groesbeck are sworn and examined as witnesses and certain documentary evidence admitted on the part of the defendants and both parties rest. And the court having heard the evidence adduced as well on the part of defendants as the plaintiff, thereupon followed the arguments of counsel, which were continued to the hour of adjournment, when the further trial of this cause is continued until the incoming of this Court on tomorrow morning.

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63 Amendment to Plaintiff's Reply to Answer of Defendant Edward E. Jenkins, Receiver.

Comes now the plaintiff National Surety Company and by leave of court first had and obtained, and without waiving its Motion to Strike herein, amends its Reply to the answer of the defendant receiver herein, by adding to the same the following paragraph:

25A. That the said defendants and each of them are, by reason of the failure of the defendant Edward J. Groesbeck to comply with Section 4500 Compiled Laws of Utah, 1917, to take good and sufficient security to fully protect the funds of Salt Lake County so deposited by him, and the failure of the bank to give such security, barred and estopped from asserting that this plaintiff is not entitled to have the claim herein sued upon allowed and approved as a claim against said defendant receiver and that dividends be paid thereon to this plaintiff on the same basis as to all other common creditors of the bank. The plaintiff further alleges that the said National City Bank having accepted the benefit derived from the surety bond furnished by this plaintiff in its behalf, and the said interpleaded defendants, American Surety Company and E. J. Groesbeck having received and accepted

64 the benefits derived from the said surety bond furnished by the National Surety Company and the payment thereunder of the sum of $125,000.00, cannot escape from the burden connected therewith or the obligation assumed by said bank in securing said bond, and that the said defendants and each of them are, by reason thereof, barred and estopped from asserting and claiming that the claim of the

plaintiff herein sued upon should not be allowed and approved and dividends thereon be paid to it upon the same basis as to other common creditors of the bank.

A. E. MORETON
Attorney for Plaintiff.

Filed Decr. 3, 1925, by leave of Court.

JOHN W. CHRISTY, Clerk.

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65 Order Transferring Case from Law to Equity Side.

At this 3rd day of December, 1925, come again said parties by their respective attorneys, and the trial of this cause is resumed. And it is ordered nunc pro tunc as of December 2nd, 1925, this cause be transferred from the law to the equity side of this Court. And after due consideration it is ordered that plaintiff's motions to strike from answer of E. J. Groesbeck and from answer of defendant Receiver, be, and the same is hereby denied. Whereupon, plaintiff moves for judgment upon the pleadings and proof and the Court being well advised in the premises, doth deny said motion. And thereupon the Court finds in accordance with an oral opinion in favor of defendants, with directions to prepare and submit form of decree in accordance with said opinion.

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66 (Decree, December 31, 1925.)

This cause came on regularly for trial on the 2nd day of December, 1925, before the Court, Honorable Tillman D. Johnson, Judge. The Court having heard all of the evidence in behalf of all of the parties hereto, and the cause having been argued and submitted for decision, and the Court having been fully advised in the premises, does hereby find that the subject matter of this action has heretofore been fully determined and adjudicated by decree of this Court made and entered on the 10th day of June, 1924, in case No. 8069, entitled "Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of said Salt Lake County, and American Surety Company of New York, a corporation, plaintiffs, vs. Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, a national banking association, defendant, National Surety Company of New York, a corporation, Americian Indemnity Company, a corporation, and Massachusetts Bonding & Insurance Company, a corporation, Interpleaded Defendants."

67 Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the issues herein be and they are found in favor of the defendant Jenkins, as Receiver, and the American Surety Company of New York and E. J. Groesbeck, interpleaded defendants, as follows:

1. Plaintiff's claim herein sued upon is approved and allowed, subject to the following conditions, limitations and qualifications:

(a) That the National Surety Company, plaintiff, shall have and recover nothing from the defendant Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, until and after such time as the said Jenkins, Receiver, shall have paid to the American Surety Company or until the American Surety Company shall have received out of the assets of said bank, including the proceeds from the $360,000.00 par value of Crystal Lake Farms Company bonds, the sum of $223,362.15, together with interest at the rate of 8 per cent per annum on the sum of $200,000.00 from the 29th day of February, 1924, all as provided in that certain decree of June 10, 1924, hereinbefore referred to.

(b) That the allowance of the National Surety Company's claim herein sued upon, shall not affect the present basis of computing and paying dividends as now established by the Receiver upon claims heretofore approved.

(c) That the Receiver shall not set up the claim of the National Surety Company herein sued upon on his books as an aproved claim upon which dividends are to be paid, nor shall be set aside any funds or assets for the payment of dividends thereon, nor shall he pay any dividends thereon, and plaintiff's claim to share at this time in dividends upon said claim, is denied. The right of said National Surety Company on account of said claim to participate in the assets of said bank after the payment of the American Surety Company in full, as above provided, as against the defendant Jenkins as Receiver, and as against the other creditors of this bank, is not by this decree determined.

Dated this 31st day of December, 1925.

TILLMAN D. JOHNSON
Judge.

Filed December 31, 1925. John W. Christy, Clerk.

68 Order Giving Plaintiff and National Surety Company Until March 15, 1926, to Serve and File Condensed Statement of Evidence.

Good cause appearing therefor, it is hereby ordered that the plaintiff National Surety Company may have to and including March 15, 1926, within which to file its Condensed Statement of the Evidence herein.

TILLMAN D. JOHNSON, Judge.

Dated January 26, 1926.

Filed in United States District Court, District of Utah, Mar. 20, 1926. John W. Christy, Clerk.

Order Extending time to Plaintiff and National Surety Company Until April 5, 1926, to Serve and File Condensed Statement of Evidence.

Good cause appearing therefor, it is hereby ordered that the plaintiff National Surety Company may have to and including April 5, 1926, within which to file its Condensed Statement of the Evidence herein.

TILLMAN D. JOHNSON, Judge.

Dated: March 13, 1926.

Filed in United States District Court, District of Utah, Mar. 20, 1926, John W. Christy, Clerk.

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69 Condensed Statement of Evidence

(Filed in U. S. District Court on March 25, 1926.)

Be It Remembered that the trial of the above entitled action was begun on the 2nd day of December, 1925 and concluded on the 3rd day of December, 1925, at Salt Lake City, in the District of Utah, before Honorable Tillman D. Johnson, District Judge; and the cause was submitted to the Court for its consideration and decision on said 3rd day of December, 1925; Testimony of witnesses and documentary evidence were introduced by the several parties, Arthur E. Moreton appearing for the plaintiff, National Surety Company, and Messrs. Bagley, Judd and Ray appearing for the defendant Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, and Messrs. Cheney, Jensen, Martineau and Stephens appearing for the interpleaded defendants, E. J. Groesbeck, County Treasurer of Salt Lake

County, and for the American Surety Company of New York, a corporation. A simple and condensed statement of all of such evidence (both oral and documentary) is hereby prepared by the plaintiff National Surety Company, a corparotion, and lodged in the office of the Clerk of said Court, agreeable to and in conformity with law and the rules of
70 Court regulating such matters, for approval by the Court and filing in the Clerk's Office as a part of the records of appeal in said cause, as follows:

The Court: You may proceed, gentlemen.

Mr. Jensen: If the Court please, at the outset of this matter, I understand the case is now on the Law side; I think it is clearly an equitable case; as the pleadings now stand, it is an application on the part of the National to have their claim against the Receiver allowed and involves merely the allowance of a claim. I think it is important that the case should be on the proper side of the docket.

Mr. Moreton: The situation is just this, as I understand it, we have brought an action at law herein upon a written contract. The defendants have attempted to raise some equitable questions by their answers. We have filed our motion to each of their answers to strike therefrom those portions which relate to equitable matters, on the ground that they are immaterial, irrelevant, sham and frivolous and should not be considered.

Mr. Ray: I take the position that the action itself is an action for equitable relief. The National Surety Company cannot come in here and get a judgment against the Receiver for any particular sum of money on account of the claim as against him. What he can get is a decree of this Court that his claim shall be allowed; that thereafter he shall participate pro rata with other creditors. His relief must be equitable upon the face of his complaint.

Mr. Moreton: I do not agree with counsel that that makes it an equitable action. The gravemen of our complaint is at law on an express contract.

The Court: The case is set for trial before the Court, without a jury, and a jury is waived. If it is an equitable action, of course the Circuit Court of Appeals would review the facts.

Mr. Jensen: If the Court please, I feel so far as we are concerned we are perhaps in the technical position to
71 have it regarded as a law action, that is, I mean, so far as technical advantage is concerned, but I really,

sincerely feel it merely involves the allowance of a claim in a money judgment; that it is equitable in character; that it ought to be on the equity side.

The Court: I will express my opinion if you desire me to after I have heard all the testimony in the case and heard your argument, but after all, my view of it would not be determinative; you might lose your rights in the Circuit Court of Appeals by not preserving a law record. You maintain it is a law case. You better preserve your record as if it were. If you are right you will get your case reviewed, if it is necessary for you to have it reviewed.

Mr. Moreton: Personally, of course, I would like, if it is going to the Circuit Court, to have the facts reviewed. On the other hand, there are certain defenses that are put in here that I think are not equitable.

The Court: We will get to that then when we get to your defense. In any event, the Court is going to try the case. The plaintiff may proceed to try its side of the case, and when we get to the answer you can raise all the questions you desire to.

Mr. Jensen: We filed our original answer and will now ask permission to file an amended answer.

Mr. Moreton: We make no objection to it, except that it presents those equitable questions, the same as the original did, but elaborates somewhat upon them.

The Court: I will pass upon that when I get to it. If they constitute no defense, and the Court so holds, you are protected. The record may show that the reply filed by the plaintiff National Surety Company shall be deemed and considered as a reply to the amended answer of the American Surety Company and Groesbeck and that in turn the plaintiff's motions may be considered as applying to this amended answer.

The defendants admit the formal allegations contained in paragraphs 1, 2, 3 and 4 of the complaint, with the qualification that the National City Bank is not now a going concern.

72 Mr. Jensen: We do not admit paragraph 6 in the way it is pleaded.

The Court: That is a construction that the Court must finally determine.

Mr. Jensen: We admit that on the 3rd day of January, 1921, the National City Bank executed and delivered to Mr. Groesbeck, its depository bond in the sum of $125,000.00 and as an inducement to secure the treasurer to make the deposit of money, and that the bond was furnished by the National Surety Company; that the bank furnished the bond as required by Section 4500 of the Compiled Laws of Utah 1917, and the treasurer deposited funds in the bank as such.

Mr. Moreton: That is the same bond that was offered in the other action and it is pleaded and attached to the complaint and made a part of the complaint.

FRED A. MORETON, a witness produced by the plaintiff National Surety Company, being first duly sworn, testified upon direct examination as follows:

I reside at Salt Lake City. My business is insurance and surety bonds. During the year 1920 I was and still am an attorney in fact and Resident Assistant Secretary of the National Surety Company and connected with the J. B. Moreton Company, who are general agents of the National Surety Company for the State of Utah. I am and was acquainted with E. J. Groesbeck in December, 1920, and also with the National City Bank of Salt Lake City.

Mr. Jensen: It is admitted that E. J. Groesbeck took office as County Treasurer on January 1, 1921, and has ever since been such treasurer.

The National City Bank applied to the National Surety Company for a depository bond in the month of December, 1920, and made the customary written application for this depository bond on our form, and submitted it to us with a letter over the signature of the cashier. Exhibit 1 is a copy of this application referred to.

Mr. Jensen: We raise no question on the ground it is a copy.

73 The application was signed: "National City Bank by J. P. Gardner, Vice-President, Frank Pingree, Cashier." The original of that application was delivered by the National City Bank to the National Surety Company on or about the 22nd day of December, 1920, the date it bears Pursuant to that application, the National Surety Company issued a depository bond, as requested in said application. Exhibit 2 is a copy of the bond issued by the National Surety Company pursuant to that application. The National Surety;

Company and J. B. Moreton Company as its agent, in executing and delivering this bond, Exhibit 2, relied on the statements contained in the application, Exhibit 1. When the original of this depository bond. Exhibit 2, was executed, it went to the bank for the bank's signature first, and then it was delivered to County Treasurer Groesbeck. The original bond was executed, at the conclusion thereof, by the "National City Bank of Salt Lake City, by H. J. Wallace, vice-president, Attest, F. M. Pingree, Cashier."

Mr. Moreton: We offer in evidence Exhibits 1 and 2. As stated, there is no objection to our offering copies instead of the originals.

Mr. Ray: May I make this objection to the offer, if the Court please, in behalf of the Receiver, that the Exhibits one and two are immaterial and incompetent and irrelevant for the reason, first, that the liability, if any there be, arising out of such exhibits has, as appears from the pleadings in this case, already been adjudicated and determined: second, that it does not appear either from the pleadings or from any of the evidence shown that the creditors of the National City Bank whom this bond secures have been paid in full, and until they are, this Exhibit would be immaterial.

The Court: The objection will be overruled. Those matters will all come up on the final argument.

Mr. Jensen: If the Court please, in the interest of time, may we have this stipulation that any evidence offered or the benefit of any cross-examination or any objections or exceptions made in behalf of the Receiver or of the
74 American Surety Company or Mr. Groesbeck, shall apply equally as to any of those parties.

The Court: It may be so understood. Objection for one is in behalf of all.

Mr. Jensen: Yes, and testimony offered by one is testimony, or cross-examination, is testimony for all.

The Court: It may be so understood.

(Exhibit 1 is in words and figures as follows:)

"Notice: Agents' acts not binding on Company unless within Agents' written limits of authority.

'Safety First'
National Surety Company
Capital and Surplus Over $8,000,000.00.

"Application by a Bank or Trust Company for Depository Bond National Surety Company:

Application is hereby made by the undersigned for a bond, the amount and tenor of which are herein set forth.

1. Name and location of Bank or Trust Company, (Give correct corporate title.) National City Bank of Salt Lake City, Utah.

2. Name of Obligee to whom bond is to run Edw. J. Groesbeck, County Treas.

3. Amount of bond, $125,000.00.

4. Maximum amount of deposits bond is required to secure, $125,000.00.

5. (a) Specify rate of interest to be paid 2½. (b) Moneys covered by this bond County.

6. Date from which bond is required Jan. 1, 1921.

7. Date upon which bond is required Dec. 31, 1922.

8. Do you agree to pay $625.00 premium annually yes.

9. When was Bank or Trust Company incorporated, and under the laws of what state was the incorporation had? Utah—1912.

10. Date of beginning business Feb. 1913. If reorganized, state when.....

11. Authorized capital $250,000.00.

12. Amount of Stockholders' liability, if a State Bank, $.....

13. When was last dividend declared, paid and amount.. .....

14. When was the last examination made by National or State Bank Examiner? Nov. 29, 1920.

15. Do you belong to the Clearing House Association? Yes.

15a. If not, why do you not belong to the association?

16. Gives names and titles of the officers who give continuous personal attention to the affairs of the Bank or Trust Company.

Name	Titles
Frank Pingree	Cashier
W. G. Goodart	Asst. Cash.
Geo. N. Lambourne	President
J. P. Gardner	Vice-Pres.
Henry W. Wallace	" "

17. By whom are the loans of the Bank or Trust Company directly authorized?

75 18. The following is a true financial statement of said Bank or Trust Company, showing its resources and liabilities at the close of business on the 22nd day of Dec. 1920:

Resources		
Loans and Discounts		2129631.70
Amount of above loans to directors.....		
What amount secured by collateral	$60550.00	
Amount of above loans to officers, not directors, approved by directors		
What amount secured by collateral		
Overdrafts, secured, $.....; unsecured, $.....;		3262.31
U. S. Bonds to secure Circulation		250000.00
U. S. Government, State & Municipal Bonds		1327227.12
Other stocks, bonds, mortgages....		
Banking House $.....		
Furniture & Fixtures, $.....		100000.00
Other Real Estate Owned		
Due from approved Reserve Agents	$476236.47	
Due from other Banks and Bankers	$521313.10	
Checks and other Cash Items	$ 20992.73	2118542.30
Fractional Currency, Legal Tender Notes, Specie, etc. $.....		
Total		
Other Resources		12500.00
Total Resources		5941163.43
Liabilities.		
Capital Stock paid in	$250000.	
Paid in Surplus, $.....Earned Surplus	550000.	
Undivided Profits	9211.95	
National Bank Notes outstanding	246100.00	
Due to Banks	324693.76	
Individual Deposits subject to Check	$.....	
Time Certificates of deposit	$.....	
Postal Savings Deposits	$ 65558.87	
Other Deposits	$4112756.34	5063320.92
Total		

Dividends unpaid	.....
Notes and Bills Rediscounted	777842.51
Bills Payable	100000.00
Other Liabilities	.....
Total Liabilities	5941163.42

19. State rates of interest paid on various classes of deposits Ind. Dep. 2½%—Time certif. of dep. 4%—Sav. Dep. 4%—Other deposits 4%.

20. Specify Town, City, County and other public or special deposits:

Depositor	Amount deposited	Rate Int. %	Surety Bond	Amt. of Bond	Date of Expiration

76 21. Do officers and employees give Corporate Surety Bonds? Blanket Bond.

Give name of Surety U. S. F. & G. Co. Expiration date.. .....

2. Does Bank carry Burglar Insurance? Yes.
Amount 150,000.00. Name of Company Nat'l Surety. Expiration 1922-1923.

23. How much past due paper are you carrying? None.

24. If a National Bank, state whether you are on the Comptroller of the Currency's Special List. Yes.

This Agreement, made between National City Bank (hereinafter called the Depository), and the National Surety Company (hereinafter called the Company), Witnesseth:

Whereas, the Company has executed, or is about to execute, for the Depository, the bond described in the foregoing application, which application is hereby referred to and made a part of this Agreement:

Now, Therefore, in consideration of the execution of said bond and the sum of One Dollar paid to the Depository by the Company, the Depository covenants and agrees with the Company as follows:

1. That all declarations and answers made in the foregoing application are true, and that the same are made for the purpose of inducing the Company to execute the Bond applied for without demanding collateral security from the Depository.

2. That the Depository will pay to the Company, or its duly authorized Agent, the premiums agreed in said application to be paid.

3. That the Depository will, at all times, indemnify and keep indemnified the Company and save it harmless from and against all claims, demands, liabilities, costs, charges and expenses of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost, charge, expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.

4. That the Depository will immediately notify the Company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or the commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge, by reason of the execution of said Bond.

5. That the Depository will, on request of the Company, procure the Company's discharge from liability under said Bond, and the Company shall, at its option, have the right to the use of the Depository's name, and at any time shall have the right to be discharged from liability for the further default of the Depository and to require the Depository to account and give new surety or sureties.

6. That vouchers or other other evidence of payment by the Company in discharge of any liability under said Bond shall be prima facie evidence against the Depository of the fact and amount of the Depository's liability to the Company.

7. That the Company shall have the right to look to and rely upon the property of the Depository and its income and earnings, and to follow and recover out of Depository's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof, for anything due or to become due the company under this Agreement, the execution of the said Bond by the Company being for the Depository's special benefit and protection of the Depository's property, its income and earnings.

8. That the acceptance of this Agreement, and of the Depository's agreement to pay premiums for the execution of said Bond, or the acceptance at any time by the Company of other security, shall not in any way abridge or limit the right of the Company to be subrogated to any right or remedy, or limit any right or remedy which the Company might otherwise have, acquire, exercise, or enforce, and the Company shall have every right and remedy which the individual surety acting without compensation would have.

9. It is understood and agreed that the Company reserves the right to decline to issue the bond for which application is hereby made, and that no claim may be made against the Company in consequence of its failure to execute such bond; nor shall any claim be made in case the bond, executed, be not accepted by or on behalf of the obligee.

In Witness Whereof, the Depository, by authority of its Board of Directors, or Trustees, has caused this agreement to be duly signed by its President, and Cashier or Secretary, and its corporate seal to be thereto affixed this 22 day of December 1920.

In presence of

THE NATIONAL CITY BANK OF SALT LAKE CITY,
Give Name of Bank.
By J. P. Gardner, President.

Attest:

Frank Pingree, Cashier.

(Affix Corporate Seal)"

(The following is printed along left-hand margin of the face of Exhibit 1:)

"Under Chapter 340 of the laws of 1912 of the State of New York, any person obtaining property or credit by use of a false statement is guilty of a misdemeanor punishable by fine or imprisonment or both."

(Exhibit 2 is in words and figures as follows:)

"Depository Bond.

Know All Men By These Presents: That The National City Bank of Salt Lake City, Salt Lake County, Utah as

Principal, and The National Surety Company, a corporation of the State of New York, as surety, are held and firmly bound unto Edward J. Groesbeck, Treasurer of Salt Lake County, Utah, in the sum of One Hundred and Twenty Five Thousand ($125,000.00) Dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Dated the Third day of January, A. D. 1921.

Whereas, the said principal The National City Bank of Salt Lake City, has applied for a part of the funds in the treasury of the County of Salt Lake, State of Utah, to be deposited in said bank, the amount whereof shall be subject to withdrawal or diminution by said treasurer as the requirements of the said County of Salt Lake shall demand, and which amount may be increased or decreased as the said treasurer may determine; and

Whereas, the said Bank, in consideration of said deposit, and for the privilege of keeping the same, has agreed to pay to the said County of Salt Lake, State of Utah, interest on such sum at a rate not less than two per cent per annum, on the amount of said deposit, the same to be credited and paid monthly upon the daily average of such amount as the said bank shall have on deposit for the month, or any fraction thereof, next preceding the crediting or payment of said interest, which interest shall be computed and credited to the account of the Treasurer of Salt Lake County, and shall become thenceforth a part of such deposit.

Now, Therefore, if the said The National City Bank of Salt Lake City, shall, at the beginning of each and every month render to the said Edward J. Grosbeck, Treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Lake's moneys held by it during the month next preceding and the interest thereon, and how the
78 same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, Treasurer as aforesaid, and shall pay over the same, and any part thereof, upon the check or written demand of the said Edward J. Groesbeck, Treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects save and keep the said Edward J. Groesbeck, Treasurer,

harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue.

Provided, That, if the said Surety shall so elect, this bond may be cancelled at any time by giving thirty days notice in writing to the said Treasurer, and to the persons authorized by law to approve of such bond, such notice to be accompanied by a sworn statement of all facts and setting forth the reasons in connection with such request for cancellation, and this bond shall be deemed cancelled at the expiration of said thirty days, the said Surety remaining liable for all or any acts covered by this bond which may have been committed by said The National City Bank of Salt Lake City, up to and including the date of expiration of said thirty days notice. The said surety shall, upon the surrender of this bond and its release from all liability thereunder, upon request, refund this premium paid, less a pro rata part thereof for the time this bond shall have been in force.

Signed and sealed the day and year first above written.

THE NATIONAL CITY BANK
SALT LAKE CITY
By H. J. Wallace,
Vice-President.

Attest:
F. M. Pingree,
Cashier.

NATIONAL SURETY COMPANY
By J. B. Moreton,
Its Attorney-in-fact."

Direct Examination of Fred A. Moreton resumed:

When this bond was applied for, the National Surety Company demanded the execution of the application as a consideration precedent to the delivery of the bond. The application was actually delivered to the National Surety Company, or rather, to our office as general agents, before the bond itself was delivered.

Mr. Jensen: With respect to paragraph 9 of the complaint, we have admitted in our answer that Groesbeck made deposits in the bank from the 3rd day of January, 1921, until the bank closed its doors and suspended business, that pur-

suant to the arrangements made he had deposited the funds of Salt Lake County in that bank, and that the credit on the books of the bank as of the date it closed, January 17, 1922, was the sum of $643,094.29, being the amount of the deposit on said date; in other words, he had put money in the
79 bank to the amount of $643,094.29, and that on that date that was the amount of the deposit. We admit that the bank failed on January 17, 1922, and there is no dispute on that. We admit that thereafter demand was made upon the National Surety Company by E. J. Groesbeck as Treasurer, for the payment of the penalty of plaintiff's bond in the sum of $125,000.00, and after such demand the National Surety Company, on the 17th day of June, 1922, paid to E. J. Groesbeck, as treasurer of Salt Lake County, the full sum of $125,000.00, and that this money went into the County Treasury of Salt Lake County. We admit the first sentence of paragraph 10 of the complaint, that is, the assignment of $5,000.00 of the $125,000.00 to the American Indemnity Company, and that the Receiver has paid the National Surety Company nothing.

Mr. Moreton: With respect to paragraph 11, the plaintiff therein alleges it duly presented and filed with the defendant its verified claim for the sum of $120,000.00 by virtue of said Indemnity Agreement, a true copy of which is attached to plaintiff's complaint and marked Exhibit "C". Gentlemen, are you willing to admit that allegation?

The Court: You admit, do you not, Mr. Ray, that he presented to the Receiver a claim of $120,000.00, of which the document he now holds in his hands is a copy?

Mr. Ray: We admit that.

Mr. Jensen: We admit that.

Mr. Ray: We object to its admission in evidence because it is irrelevant and immaterial, but do not object upon the ground it is a copy.

The Court: The objection may be overruled. Instead of having it marked here as in independent Exhibit, the record may show that the offer made is the copy of the claim attached to the complaint.

Mr. Ray: We will admit that this claim was received by the Receiver on the 10th day of April, 1925.

Mr. Jensen: Yes, we will admit that.

The Court: That is the claim that is sued on in this case, is it not?

80 Mr. Moreton: That is the claim sued on. I take it that the defendants will admit that the defendant Jenkins, Receiver, refused and now refuses to allow or approve this claim or pay the dividends thereon.

Mr. Ray: We admit that.

The National Surety Company has not been paid by any one any part of this $125,000.00 sued upon.

Cross-Examination of Fred A. Moreton

By Mr. Jensen:

I was not a witness in the suit wherein Salt Lake County, American Surety Company and E. J. Groesbeck were plaintiffs and the National Surety Company and the Receiver were defendants. I do not know whether the National Surety Company presented another claim to the Receiver. I have no information about that. The National Surety Company furnished only one bond to Mr. Groesbeck as surety for the National City Bank. It received two applications at the same time. One was for $250,000.00 bond covering state funds and $125,000.00 covering county funds, but only one on county funds. So far as the county funds are concerned, it received only one application from the National City Bank, at that time and furnished only one bond to Mr. Groesbeck.

Mr. Jensen: It is stipulated the same bond is involved here and the same indemnity as were involved in the prior suit.

Mr. Moreton: Yes, for the purpose of identity, but without admitting the materiality of it.

Thereupon the plaintiff rested.

The defendant EDWARD E. JENKINS, was sworn and testified on direct examination as follows:

I am Receiver of the National City Bank of Salt Lake City and the defendant in this action.

Mr. Moreton: Referring to the answer of the defend-
81 ant Receiver, Jenkins, the plaintiff has moved to strike therefrom paragraphs 23, 24 and 25, on the grounds set forth in the motion, that the same is sham, immaterial and irrelevant and do not constitute a defense to the complaint.

The Court: The motion will be denied.

Mr. Moreton: Save an exception.

Mr. Moreton: Your Honor, the plaintiff National Surety Company likewise made a motion to strike from the defendants Groesbeck and American Surety Company's answer certain portions therein set forth in my motion. There are two motions to strike, one from each answer.

The Court: Both motions will be denied. You may have your exception.

At the time the National City Bank failed and I was appointed Receiver, there was on deposit to the credit of E. J. Groesbeck, treasurer of Salt Lake County, the sum of $643,094.29. I was made Receiver on February 3, 1922, and have been ever since. Upon examination of the books, it became apparent that the assets of the bank would be insufficient to repay the depositors in said bank, and I understand that Groesbeck, as treasurer, made demand upon the bondsmen for the bank, including the National Surety Company. I concurred in that payment made by the National Surety Company to the county. The Fidelity & Deposit Company of Maryland executed a depository bond to the treasurer in behalf of the bank in the sum of $75,000.00. This $75,000.00 bond was paid to Salt Lake County and thereafter I issued to the Fidelity & Deposit Company a Receiver's certificate for $75,000.00, which certificate was issued first to Groesbeck, then, upon assignment, was turned over to the Fidelity & Deposit Company, upon Groesbeck's order. So it now holds the Receiver's certificate upon which I have been issuing dividends, and the claim of the treasurer of Salt Lake County was thereby reduced from $643,094.29 to $568,094.29, and that is the amount of the claim upon which I have been paying dividends to Mr. Groesbeck as treasurer.

Mr. Moreton: We will admit that the sum of $125,-
82 000.00 was paid by the National Surety Company to Salt Lake County, without prejudice to the rights of the surety company to claim subrogation pro tanto or to claim reimbursement from the bank, the $125,000.00 being deposited in the funds of Salt Lake County.

On the 7th day of September, 1922, a dividend of twenty per cent was paid to the creditors of the bank, and the twenty per cent paid on account of this deposit by Groesbeck as treasurer, amounted to $113,618.84.

Mr. Moreton: I object to this line of testimony for the reason that it is immaterial, irrelevant and not a defense to the cause sued upon.

The Court: The objection may be overruled and you may have an exception.

Thereafter, on the 27th day of February, 1923, an additional ten per cent, amounting to $56,809.42, was paid to Groesbeck as treasurer, a payment in the same proportion being paid to all general creditors of the bank on the same date, where the claims had been approved.

Mr. Ray: I refer to paragraph 21 of the answer next, and ask the plaintiff if it will stipulate that I may read from the Transcript of the Record made for the Eighth Circuit Court of Appeals in case No. 6819, being entitled National Surety Company, a corporation, appellant vs. Salt Lake County, a subdivision of the State of Uah, et al., appellees, the stipulation with respect to the payment to Salt Lake County of $47,000.00 of the fourth dividend.

Mr. Moreton. I object to it as immaterial.

The Court: The objection may be overruled and you may have an exception.

Mr. Ray: I refer to page 49 of the record and to the last paragraph thereof, which reads as follows:

"Mr. George G. Armstrong: If the Court please, in behalf of the plaintiff, Salt Lake County, and also that will cover Mr. Groesbeck, attorneys for the parties present have stated to me that they were willing to stipulate that the amount set forth as being the balance that was due to Salt Lake County, forty-seven thousand some odd dollars, is payable to Salt Lake County, we waiving any claim for interest against the Receiver on that amount; and as I understand if this
83 stipulation is entered into, that Salt Lake County will no longer (—) required to appear in the case,—that the case will then resolve into a contest between the surety companies that are interested here.

I would like to ask counsel if I have stated the stipulation correctly.

Mr. Jensen: So far as the American Surety Company is concerned, your Honor, it joined with the county in this suit and it has no disposition, and I am advised that the county had no disposition to attempt to collect any interest against the Receiver. We are satisfied that the Receiver

was in a difficult situation in the sense that he could not pass—did not want to pass upon the merits of the contending claims of the surety companies and he held the money until those claims could be decided.

So far as the American Surety Company is concerned, it does not desire to make any claim against the Receiver on account of any interest on any of this money that has been withheld that it may be adjudged by the court to be entitled to, and it has no quarrel with the county being entitled to the sum of $47,666.01 out of this dividend which has been held back by the Receiver. I think all parties admit that the county is entitled to that payment.

Mr. Moreton: In behalf of the National Surety Company and the American Indemnity Company, interpleaded herein as defendants, whom I represent, I will state that the stipulation is substantially as stated by judge Armstrong, that is to the effect that the county is entitled to the sum of $47,666.01 which amount will reimburse the county and make it whole by reason of its deposit in the National City Bank in the sum of some six hundred and forty three odd thousand dollars.

The Court: Who represents the county?

Mr. Armstrong: I represent the county, your Honor.

The Court: Then an order can be made paying the county.

Mr. Armstrong: Mr. Ray is here.

Mr. Ray: We will ask in pursuance of the stipulation that an order be entered by the court requiring the Receiver to pay over to Salt Lake County the sum of $47,666.01, and when that order is entered the Receiver will immediately make that payment to the county.

The Court: Let the order be entered—

Mr. Jensen: Just one minute: what is the position of the Massachusetts Bonding Company?

Mr. Ray: The Massachusetts Bonding & Insurance Company, who has been interpleaded and is represented by Mr. Judd—is not represented by Mr. Judd at this time, Mr. Judd being in the Supreme Court, but he is a member of my firm, and has authorized me to represent that the Massachusetts Bonding & Insurance Company concurs with the

National Surety Company and American Surety in the stipulation which was outlined by Judge Armstrong.

The Court: Then Salt Lake County may be dismissed from this proceeding, that is the effect of it, isn't it?

Mr. Moreton: That is the effect of it."

Mr. Ray: You stipulate, Mr. Moreton, those proceedings took place as stated in the record, do you not?

Mr. Moreton: Yes, without admitting their materiality and reserving the objection heretofore made.

The Court: The objection may be overruled and you may have an exception.

84 The Receiver's certificate issued to E. J. Groesbeck, as treasurer of Salt Lake County, in the sum of $568,094.29, is still outstanding. As Receiver, I have paid on account of that certificate sixty per cent, amounting to $340,856.52. I have further alleged in my answer that in addition to that sum, Treasurer Groesbeck received from the plaintiff National Surety Company $125.000.00, and $25,000.00 from the Massachusetts Bonding & Insurance Company. There is left unpaid on account of this certificate the sum of $227,237.71.

I had paid creditors at the date of the filing of my answer, sixty per cent of the face of their claims. I have been unable to pay any more since then. In my opinion, the most that we will be able to pay the creditors from now -on is another fifteen per cent. The Crystal Lake Farm Company bonds of the par value of $360,000.00, have no practical value at this time. I have been familiar with these bonds and their history ever since the failure of the bank. In my best judgment there will be a loss of twenty five per cent to depositors and creditors of the bank.

The Court: Are you going to contest that statement at all, on the inability to pay more than 75 per cent on the indebtedness?

Mr. Moreton: I don't know your Honor. The receiver is in a better position to state what the fact is than we are. If the receiver states that is the fact it is undoubtedly true.

In order to pay a ten per cent dividend to creditors, it is necessary to have on hand the sum of $158,382.03. The recognized claims against my trust amount to $1,583,926.88, according to my report to the Comptroller as of this date.

Q. So in order for you to pay fifteen per cent additional you have to get from the assets,—realize from the assets, some $237,000 or $240,000?

A. At fifteen per cent, yes.

Mr. Moreton: Our objection goes to all this, your Honor, that it is immaterial and does not constitute a defense.

The Court: The objection may be overruled and you
85 may have an exception. We will consider that matter when we get all the testimony in.

Mr. Moreton: May that objection and exception be considered to all this line of testimony? I made the objection once before, but haven't repeated it, but may I have the benefit of it throughout?

The Court: It may be so understood.

Mr. Ray: Referring again to paragraph 25 on the top of page 10, you set forth in your complaint it will require the sum of $85,000 and some additional to pay the fifteen per cent dividend on account of the Groesbeck certificate; is that correct?

Mr. Moreton: Same objection and exception.

A. Yes.

86 Q. Let me ask you this question, Mr. Jenkins, if you were required at this time to pay the National Surety Company and the Massachusetts Bonding and Insurance Company as general creditors as claimed in this suit, you would have to pay them sixty per cent at once, wouldn't you, to have them paid equally with your other creditors?

Mr. Moreton: Object to that as being immaterial.

The Court: That is the same objection.

A. Yes.

The Court: Objection overruled.

Mr. Moreton: Exception.

Mr. Ray: After having done that would you then, in your opinion, be able to realize sufficient assets from the assets of this bank to pay the creditors of the bank the full amount of their claims?

Mr. Moreton: It is apparent he cannot even now pay the creditors the full amount of their claims. The addition of another claim would—

Mr. Ray: That is preliminary.

The Court: He may answer.

Mr. Moreton: Exception.

A. No.

Q. Referring particularly to the treasurer of Salt Lake County and the American Surety Company as creditors and having in mind, Mr. Jenkins, that they have had in addition to your dividend $150,000 from the depository sureties, would you be able to pay them out in full in the event you were required to pay sixty per cent to the National Surety Company and the Massachusetts Bonding Company?

Mr. Moreton: Object to that as immaterial and irrelevant, not within the issues, and not constituting a defense, and being a question that should not be raised here by the Receiver. Seems to me it is no interest of his how many claims are allowed so long as they are just claims.

87 The Court: I think it is quite apparent from the testimony heretofore given that he would not be able to pay out from any standpoint, so he may answer.

Mr. Moreton: Save an exception.

A. No.

The Court: The defendant is contending that the county must be paid in full before you are paid at all. Assuming that contention were true, will there be anything left to be distributed after the county is paid, as you understand it?

Mr. Moreton: I understand there will be. The county will be overpaid if these dividends are continued to be paid. As it now stands, the county has been made whole by reason of the payment in part by this plaintiff of $125,000.00 and $25,000.00 by the Massachusetts Bonding Company, together with the dividends that have heretofore been paid.

Mr. Jensen: If the Court please, so far as Salt Lake County is concerned, it was paid in full at the commencement of the other suit by the order that it takes $47,000.00. We are now in this situation, that the Court there gave the American Surety Company, as the assignee of Groesbeck and as his subrogee, a judgment for $200,000.00, with interest at the rate of eight per cent from February 29, 1924, and also an additional judgment for $23,000.00. The county hasn't any claim against the Receiver at all, but Mr. Groesbeck has a claim of $223,362.15 with interest at eight per cent

on $200,000.00, of which he has received to date $125,780.08. There is a balance due the American now of $125,666.00. If an additional fifteen per cent is paid, it would run around $88,000, something like that, he would still be short a matter of $40,000, or more.

The Court: Do you dispute that?

Mr. Moreton: Yes, your Honor, I cannot agree to counsel's statement. We claim the county has long ago been paid in full. It is claimed here that this certificate of Groesbeck is outstanding and there is so much due
88 upon it. As to whether there is anything due upon it, is a question of law.

The Court: So that, as the matter now stands, upon the theory of the defendants', there would never be any assets out of which you could be paid anything.

Mr. Moreton: That is a fact, unless, of course, our claim were allowed.

Mr. Ray: Was it understood that on matters where we have community of interest, the Receiver, the American and Groesbeck, where the same proof would supply both of our needs, it may be considered as applying to both of us?

The Court: Certainly.

Mr. Jensen: I have marked here as Exhibit 3, the Transcript of the Record in the United States Circuit Court of Appeals in case No. 6819 and 6820, which has been referred to as having been tried in this Court involving the suit of National Surety Company a corporation, appellant, vs. Salt Lake County, et al. We offer the Complainant in that case, which commences at page 1 of exhibit 3 and continues to page 7, with its Exhibit.

(The part of the former record designated and offered is in words and figures as follows:)

"Complaint.

In the District Court of the United States, in and for the District of Utah, Central Division.

Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of said Salt Lake County, and American Surety Company of New York, a corporation, Plaintiffs,

No. 8069. vs. Law.

Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, a national banking association, Defendant.

Plaintiffs complaint of the defendant, and for cause of action allege:

89

I.

That at all times herein mentioned, Salt Lake County was and is a county duly organized and existing under the laws of the State of Utah, and a subdivision of said State of Utah, with power to sue and be sued; that the plaintiff E. J. Groesbeck was, during all the times herein mentioned, and now is the duly elected, qualified and acting County Treasurer of Salt Lake County, Utah, and as such, among other things, was required by the laws of the State of Utah to receive all moneys belonging to said Salt Lake County, and to safely keep the same and apply and pay out the same according to law; that the plaintiff American Surety Company of New York was, during all the times herein mentioned, and now is a corporation organized and doing business under the laws of the State of New York and duly authorized to do business under the laws of the State of Utah, by reason of a compliance with the laws of the State of Utah, with reference to doing business therein.

II.

That the defendant Edward E. Jenkins is, and was, during all the times herein mentioned and since on or about the 17th day of January, 1922, has been, the duly appointed and acting Receiver of the National City Bank of Salt Lake City, Utah; that the said National City Bank of Salt Lake City, Utah, was a national banking association duly organized and existing under and by virtue of the National Banking Act, with its office and principal place of business at Salt Lake Citay, Utah.

III.

That on or about the 3d day of January, 1921, the said E. J. Groesbeck as said County Treasurer, furnished and filed, as provided by law, his official bond with the American Surety Company of New York thereon as surety, for the penal sum of Two Hundred Thousand ($200,000.00) Dollars, which was conditioned as follows:

'The Condition of This Obligation Is Such, that Whereas, the above bounden principal has been duly elected to the office of County Treasurer in and for Salt Lake County, for a term beginning January 3, 1921.

'Now, therefore, if the said Edward J. Groesbeck shall well, truly and faithfully perform all official duties now re-

quired of him by law and also such additional duties as may be imposed on him by any law of the State, subsequently enacted, and if he shall account for and pay over and deliver to the person or officer entitled to receive the same, all moneys or other property that may come into his hands as such County Treasurer, then this obligation to be null and void and of no effect; otherwise to be and remain in full force and virtue.'

IV.

That prior to the 17th day of January, 1922, said E. J. Groesbeck, as County Treasurer of Salt Lake County, received into his hands and possession large sums of money and deposited the same in the National City Bank of Salt Lake City, Utah, which bank closed its doors on the 17th day of January, 1922, and went into the hands of said Edward E. Jenkins as Receiver appointed by the Comptroller of Currency of the United States Government; that at said time said County Treasurer and said County had on deposit with said bank, County funds in the sum of Six Hundred Forty Three Thousand Ninety-four and 29/100 Dollars ($643,094.29); that through payments made by certain companies which had furnished depository bonds, and through payment by the said American Surety Company of New York of the principal sum of Two Hundred Thousand Dollars ($200,000.00) and $23,362.13 interest and through payment of dividends by said Receiver, the claim of said County and said County Treasurer against said bank has been reduced to the sum of Forty-seven Thousand Six Hundred Sixty-six and 01/100 Dollars ($47,666.01); that when said County Treasurer and said County have received the further sum of Forty-seven Thousand Six Hundred Sixty-six and 01/100 Dollars ($47,666.01) on account of said deposit, together with such interest on said sum as has legally accrued as against the defendant herein, the claim of said County Treasurer and said County will have been paid in full.

90 V.

That on or about the 5th day of October, 1923, in due course of administration, the Comptroller of Currency of the United States regularly authorized and directed the defendant herein to pay a dividend of Ten per cent upon all claims that had been filed with the defendant and listed and approved by him; that at said time and prior thereto, the claim of said Salt Lake County and the Treasurer thereof, on account of said moneys deposited in said bank, had been approved by

said Receiver, and said Receiver had at the time of the declaration of prior dividends, caused payment of same to be duly made to said Salt Lake County and the County Treasurer thereof, at the same time that other creditors of said bank with approved claims had received dividend payments; that since the 5th day of October, 1923, the defendant, as Receiver of said bank, has had on hand and in his possession regularly declared and set apart as a dividend on the claim of said County and said County Treasurer, the sum of Fifty-six Thousand Eight Hundred Nine and 42/100 Dollars ($56,809.42) which he declines and refuses to pay over to said Salt Lake County and its said Treasurer, or to any persons whatsoever; that on the 5th day of October, 1923, the plaintiff American Surety Company of New York had not discharged and paid to the said Salt Lake County its liability aforesaid as surety upon the official bond of said County Treasurer; that on or about the 17th day of January, 1924, the plaintiff herein advised the defendant that said American Surety Company of New York was about to pay its said liability to said Salt Lake County, and requested and demanded that the defendant pay to said Salt Lake County and its said Treasurer, or to the plaintiffs herein jointly, the said dividend in order that an adjustment of accounts might be made between the plaintiffs herein; that the defendant declined to pay over the said dividend to the plaintiffs, or any of them, and has ever since declined and refused to pay over the same.

VI.

That when said Salt Lake County has received said Forty-seven Thousand Six Hundred Sixty-six and 01/100 Dollars ($47,666.01) and thereby has been fully paid and made whole on account of the moneys so deposited in said National City Bank of Salt Lake City, Utah, the America Surety Company of New York will be entitled, by operation of law, to be subrogated to the rights of the County and the County Treasurer, as against said National City Bank of Salt Lake City, Utah, and its said Receiver, by reason of the County moneys deposited in said bank, and will be entitled to payment to it of all moneys and dividends lawfully payable by said Receiver as dividends on account of said deposit until said American Surety Company of New York has been paid; that on or about the 29th day of February, 1924, by agreement and contract the said Salt Lake County and its said Treasurer, assigned to said American Surety Company of New York all their right, title and interest and claims as against said Na-

tional City Bank of Salt Lake City, Utah, on account of said deposit, and in and to said dividends on said deposit already declared and in the hands of said Receiver, save and except their right and claim in and to said Forty-seven Thousand Six Hundred Sixty-six and 01/100 Dollars ($47,666.01) of said moneys; a copy of which Assignment is hereto attached, marked Exhibit A and made a part hereof as fully as if set out at length at this point in this complaint herein.

Wherefore, Plaintiffs pray judgment against the said defendant as follows:

1. That it be ordered, adjudged and decreed that said defendant pay over immediately to said plaintiff the said dividend now held by him in the sum of Fifty-six Thousand Eight Hundred Nine and 42/100 Dollars ($56,809.42) together with interest thereon from the 5th day of October, 1923, said principal sum and interest to be distributed Forty-seven Thousand Six Hundred Sixty-six and 01/100 Dollars ($47,-666.01) and interest thereon from October 5th, 1923,
91 to said Salt Lake County, and the balance of Nine Thousand One Hundred Forty-three and 41/100 Dollars ($9,143.41) with interest thereon from the 5th day of October, 1923, to said American Surety Company of New York.

2. That it be ordered, adjudged and decreed that all further dividends accruing in the hands of the defendant by reason of the deposit of County funds in said bank, be paid over to said American Surety Company of New York, or its order, when and as dividends are directed and ordered to be paid by the Comptroller of Currency of the United States to other creditors of said bank until said American Surety Company of New York has been repaid in full for the losses sustained by it as surety upon the official bond of said County Treasurer.

3. That plaintiffs have their costs herein incurred.

GEORGE G. ARMSTRONG,
CHENEY, JENSEN, HOLMAN &
STEPHENS,
Attorneys for Plaintiffs.

State of Utah,
County of Salt Lake—ss.

William E. McKell being first duly sworn, deposes and says: That he is an officer, to-wit, Resident Vice-President

of the American Surety Company of New York, a corporation, one of the plaintiffs above named; that he makes this verification for and on behalf of said corporation; that he has read the foregoing complaint and knows the contents thereof; that the same are true of his own knowledge except as to matters therein stated upon information and belief, and as to such matters he believes it to be true.

WILLIAM E. McKELL.

Subscribed and sworn to before me this 10th day of March, 1924.

(Seal) ROSE SMITHERS,
Notary Public, Residing at Salt Lake City, Utah.

Filed in United States District Court, District of Utah, Mar. 10, 1924.

JOHN W. CHRISTY, Clerk.

Exhibit "A".

Assignment of Claim.

Whereas, E. J. Groesbeck, as County Treasurer of Salt Lake County, had on deposit in the National City Bank on the date when said bank passed into the hands of a receiver, the sum of Six Hundred Forty-three Thousand Ninety-four 29/100 Dollars ($643,094.29), and

Whereas, Said E. J. Groesbeck has heretofore made an assignment of all his rights to dividends of said bank on the sum of Seventy-five Thousand Dollars ($75,000.00) of said deposit, and

Whereas, The American Surety Company of New York has paid to said E. J. Groesbeck as Treasurer of said Salt Lake County, and to said Salt Lake County, the sum of Two Hundred Thousand Dollars ($200,000.00) as surety upon the official bond of said E. J. Groesbeck as said Treasurer of Salt Lake County, and

Whereas, Said Salt Lake County, has received from certain depository sureties and by way of dividends from said receiver further sums from time to time, and its claim against said receiver by reason of said deposit is now reduced to the sum of Forty-seven Thousand Six Hundred sixty-six and 01/100 Dollars ($47,666.01), and

Whereas, The receiver of said bank has on hand declared and set apart as a dividend payable on said claim, the sum of Fifty-six Thousand Eight Hundred Nine and 42/100 Dollars ($56,809.42), which he declines and refuses to pay over, and

92 Whereas, After the further payment to said Salt Lake County and its said Treasurer of the said balance of Forty-seven Thousand Six Hundred Sixty-six and 01/100 Dollars ($47,666.01), the American Surety Company of New York is entitled to be subrogated to the rights of said Treasurer, and of said County, and of said Treasurer in his individual capacity, on account of said deposit in said bank, as against said bank and is also entitled to an assignment of all the rights and claims of said County and said Treasurer in and to the Three Hundred Sixty Thousand ($360,000.00) Dollars par value of the bonds of the Crystal Lake Farms Company held by said Treasurer as collateral security for the payment of said moneys represented by said deposit.

Now, Therefore: For and in consideration of the premises and the sum of One Dollar, and other good and valuable considerations, the said E. J. Groesbeck, as Treasurer of Salt Lake County, by and with the approval of the County Commissioners of Salt Lake County, does hereby, and said Salt Lake County does hereby assign, transfer and set over unto the American Surety Company of New York, the surety on the official bond of said E. J. Groesbeck, as County Treasurer, all rights and claims of the said E. J. Groesback, as Treasurer of Salt Lake County, and of Salt Lake County, against said National City Bank on account of the balance of said deposit except only that it is agreed and understood that said Salt Lake County is first entitled to the payment to it of Forty Seven Thousand Six Hundred Sixty-six 01/100 ($47,66.01) Dollars of said moneys, and the undersigned do hereby request the receiver of said bank to make all further payments of moneys on account of liquidation dividends on said claim to said American Surety Company of New York, after said Salt Lake County has received in full said sum of Forty-seven Thousand Six Hundred Sixty-six 01/100 ($47,666.01) Dollars, and said E. J. Groesbeck as County Treasurer of Salt Lake County, and said Salt Lake County, do hereby assign, transfer and set over unto said American Surety Company of New York all its rights and claim in and to the Three Hundred Sixty Thousand ($360,000.00) Dollars par value of

the bonds of the Crystal Lake Farms Company held as security for the payment of said moneys represented by said deposit.

In Witness Whereof the said E. J. Groesbeck as County Treasurer of Salt Lake County has hereunto set his hand and seal, and Salt Lake County has caused this Assignment of Claim to be executed by the Chairman of its Board of County Commissioners, attested by its Clerk, this the 29th day of February, 1924.

(Signed) E. J. GROESBECK (Seal)
County Treasurer
Salt Lake County.

(County Seal) (Signed) SALT LAKE COUNTY
By E. L. Burgon
Chairman Board of
County Commissioners.

Attest:
(Signed) Clarence Cowan, Clerk.
(Signed) By Fred C. Bassett, Deputy Clerk."

Mr. Jensen: We desire to offer the answer of the Receiver, Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, the answer and interpleader, commencing at page 7 of defendant's Exhibit 3, and continuing to page 12.

(The part of the former record designated and offered is in words and figures as follows:)

93 "Answer and Interpleader.

In the District Court of the United States, in and for the District of Utah, Central Division.

Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of said Salt Lake County, and American Surety Company of New York, a corporation, Plaintiffs,

No. 8069. vs. Law.

Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, a National Banking Association, Defendant.

Comes now Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, a National Banking Association, and for answer to the complaint of plaintiffs on file herein, admits, denies and alleges:

1. Admits paragraphs I, II and III of plaintiff's complaint.

2. Answering paragraph IV of plaintiffs' complaint defendant admits said National City Bank closed its doors and suspended business on the 17th day of January, 1922, and admits that on said day said E. J. Groesbeck, as Treasurer of Salt Lake County, Utah, had on deposit with said National City Bank the sum of $643,094.29.

3. Defendant alleges that prior to the failure of said National City Bank said bank had furnished to plaintiff County and to Groesbeck, its Treasurer, depository bonds to protect said deposit against loss by reason of failure of the bank; that one of said depository bonds so furnished was the bond of the Fidelity and Deposit Company of Maryland, in the sum of $75,000.00; that upon the failure of said bank said Seventy-five Thousand Dollar bond was immediately and fully paid to said county by said Fidelity and Deposit Company, whereupon said Groesbeck and said Salt Lake County, in compliance with the provisions of said depository bond assigned to said Fidelity and Deposit Company of Maryland, the claim of said Groesbeck and said Salt Lake County against said National City Bank of said deposit to the extent of $75,000.00, leaving a balance due to said County and said Groesbeck, its Treasurer, on account of said deposit, the sum of $568,094.29; that immediately thereafter the National Surety Company of New York and the Massachusetts Bonding and Insurance Company paid to said county and to said Groesbeck, its Treasurer, the sums of $125,000.00 and $25,000.00 respectively, being the full sums due from said companies on account of depository bonds furnished by said National Surety Company of New York and Massachusetts Bonding and Insurance Company; that in addition to said sums so paid on account of said claims of Salt Lake County, by said Surety Companies, this defendant has paid dividends to said Groesbeck and to said Salt Lake County on account of said claim amounting to the sum of $170,428.28, being 30 per cent of the amount of said county's claim.

4. Defendant admits that upon payment by the American Surety Company of New York to said Groesbeck and said County of the sum of $200,000.00 there is left due and owing on account of said claim of said county against the said National City Bank the sum of $47,666.01.

5. Answering paragraph V of said complaint defendant admits that on or about October 23rd, 1923, there became due and payable out of funds in his possession a dividend on account of the deposit of Salt Lake County's funds in said bank amounting to $56,809.42, being 10 per cent of the
94 claim on account of said deposit, which sum is now held by this defendant and which sum this defendant is ready and willing to pay over to whomsoever is lawfully entitled thereto.

6. Further answering said paragraph V defendant admits that on or about January 17, 1924, plaintiff American Surety Company of New York, told defendant it was about to discharge its liability amounting to $200,000.00, to Salt Lake County and defendant alleges that on said day the plaintiffs herein, fully understanding the claims of the National Surety Company of New York, the Massachusetts Bonding and Insurance Company and the American Indemnity Company of Galveston, Texas, against this defendant, which claims are hereafter fully set forth, agreed to furnish defendant with a good and sufficient bond indemnifying defendant against said claims if the defendant would pay over said sum of money to the plaintiffs; that defendant agreed to pay over said money to plaintiffs upon receipt of such indemnity bond but no such bond has ever been furnished.

7. Answering paragraph VI of plaintiffs' complaint, defendant admits that when Salt Lake County has been paid the further sum of $47,666.01, said County will have been fully paid and made whole on account of the funds so deposited in said National City Bank.

8. Further answering said paragraph VI this defendant does not know and has no way of determining except by the judgment of this court what person or persons are entitled to receive from this defendant said 10 per cent dividend amounting to $56,809.42 now held by this defendant, nor can defendant tell, in the absence of the judgment of this court, to what person or persons dividends which may hereafter accrue in the possession of defendant and become payable on account of the deposit. of Salt Lake County in said National City Bank, shall be lawfully payable.

Further answering said complaint and as a separate and additional defense, and by way of interpleader, this defendant alleges:

1. That defendant claims no right or interest in or to said 10 per cent dividend amounting to $56,809.42 and is ready

and willing to pay the amount thereof into this court or to such person or persons as this court may direct.

2. That the National Surety Company of New York is a corporation of the State of New York and at all times herein mentioned has been lawfully authorized to engage in the surety business within the State of Utah; that prior to the 17th day of January, 1922, the National Surety Company of New York furnished its depository bond in the sum of $125,000.00 to protect Salt Lake County against loss on account of its deposit of funds in the National City Bank of Salt Lake City; that upon the failure of said bank the National Surety Company of New York paid over to said County the sum of $125,000.00, being the penal sum of said depository bond, and said National Surety Company of New York now claims that upon the payment to Salt Lake County of said sum it became subrogated to the extent of its bond to the rights and claims of Salt Lake County or E. J. Groesbeck, its Treasurer, against said National City Bank and this defendant, as its Receiver, and that by reason thereof it has been ever since said payment and now is entitled to receive its pro rate share of any and all dividends paid by defendant on account of the deposit of said County money, and said National Surety Company of New York now asserts that ever since the 23rd day of October, 1923, has asserted that in as much as it has received no part of any of the dividends paid on account of said deposit of County funds it is now entitled to receive such portion of the sum of $56,809.42 now held by the defendant, as will pay its pro rata share of said deposit, and ever since said 23rd day of October, 1923, said National Surety Company has been demanding that this defendant pay over and deliver to it its share of said dividend.

3. That the Massachussetts Bonding and Insurance Company is a corporaion of the State of Massachusetts and at all times herein mentioned has been lawfully authorized to engage in the surety business within the State of Utah; that prior to the 17th day of January, 1922, the Massachusetts Bonding and Insurance Company furnished its depository bond in the sum of $25,000.00 to protect Salt Lake County against loss on account of its deposit of funds in the National City Bank of Salt Lake City; that upon the failure of said bank the Massachusetts Bonding and Insurance Company paid over to said county the sum of $25,000.00, being the penal sum of said depository bond and said Massachusetts Bonding and Insurance Company now claims that upon the payment to Salt Lake County of said sum it be-

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came subrogated to the extent of its bond to the rights and claims of Salt Lake County or E. J. Groesbeck, its Treasurer, against said National City Bank and this defendant, as its Receiver, and that by reason thereof, it has ever since said payment and now is entitled to receive its pro rata share of any and all dividends paid by defendant on account of the deposit of said County money, and said Massachusetts Bonding and Insurance Company now asserts and ever since the 23rd day of October, 1923, has asserted that in as much as it has received no part of any of the dividends paid on account of said deposit of county funds, it is now entitled to receive such portion of the sum of $56,809.42 now held by the defendant, as will pay its pro rata share of said deposit and ever since said 23rd day of October, 1923, said Massachusetts Bonding and Insurance Company has been demanding that this defendant pay over and deliver to it its share of said dividend.

4. Defendant is informed and believes that the National Surety Company of New York has assigned and transferred to the American Indemnity Company its claim against the National City Bank and this defendant to the amount of $5,000.00 and that said American Indemnity Company, as assignee of said National Surety Company of New York, claims an interest in and to all dividends declared on account of said deposit of Salt Lake County, and especially said American Indemnity Company claims an interest in and to the dividend now declared and withheld in the sum of $56,809.42.

5. That the said National Surety Company of New York, the Massachusetts Bonding and Insurance Company and the American Indemnity Company have been and now are threatening this defendant with suits to recover from defendant said dividend, and to otherwise vex and harass this defendant concerning the same; that defendant has at all times since the 23rd day of October, 1923, been ready and willing to deliver over to the person or persons lawfuly entitled to receive the same, the full amount of said dividend, but defendant has no means of knowing and is unable to determine the merits of the controversy or the respective rights in and to said dividend of the plaintiffs herein, and the other persons herein referred to as claimants of said dividend.

Wherefore, defendant prays that this court make and enter an order requiring the plaintiffs herein and the National Surety Company of New York, the Massachusetts Bonding and Insurance Company of Massachusetts and the American Indemnity Company of Galveston, Texas, to interplead to-

gether and set forth and litigate their rights among themselves concerning said dividend of $56,809.42, now held by this defendant, and that they be required to set forth and litigate their rights among themselves of any future dividends which may accrue and come into the possession of this defendant by reason of the deposit by Salt Lake County of said funds in the National City Bank; that upon payment into court of the amount of said dividend, to-wit, $56,809.42, this defendant be discharged from all liability in relation thereto and that it be hence dismissed with its costs expended herein.

BAGLEY, JUDD & RAY,
Attorneys for Defendant.

State of Utah,
County of Salt Lake—ss.

Edward E. Jenkins, being first duly sworn, deposes and says: That he is the defendant above named; that he has read the foregoing Answer and Interpleader, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein set forth on information and belief, and as to those matters he believes it to be true.

EDWARD E. JENKINS.

96 Subscribed and sworn to before me this 22nd day of March, 1924.

(Seal) ELEANOR CAMERON
Notary Public. Residence: Salt Lake City, Utah.

Received copy of the foregoing answer and interpleader this 24 day of March, 1924.

CHENEY, JENSEN, HOLMAN & STEPHENS
Atttorneys for Plaintiff for American Surety Company of New York.

GEO. G. ARMSTRONG
Attorneys for Salt Lake County & E. J. Groesbeck.

Filed in United States District Court, District of Utah, Mar. 24, 1924, John W. Christy, Clerk."

Mr. Jensen: We offer the order of interpleader of the court appearing on page 13.

(The part of the former record designated and offered is in words and figures as follows:)

"Order directing Receiver of National City Bank to Pay Certain Money, etc.)

The parties hereto, by and through their respective attorneys, having, on this 28th day of March, 1924, in open court, made their stipulation, and the court having heard the same and being advised of the premises, it is therefore ordered:

1. That the defendant Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, pay unto the clerk of this court the sum of $56,809.42 on or before the 28th day of April, 1924, said sum to remain in the hands of the clerk abiding the orders and direction of this court.

2. That The National Surety Company of New York, a corporation of New York, authorized to do business within the State and District of Utah; and Massachuesetts Bonding and Insurance Company, a corporation of the State of Massachusetts, authorized to do business within the State and District of Utah; the American Indemnity Company, a corporation of the State of Texas, be and they are hereby ordered and commanded to interplead in this action and show cause, if any they have, why the money tendered into court in accordance with this order and claimed by the plaintiffs in their complaint on file herein, should not be forthwith paid to said plaintiffs.

Witness the hand of the court this 28th day of March, 1924.

(Signed) TILLMAN D. JOHNSON,
Judge.

"Filed in United States District Court, District of Utah, March 28, 1924. (Signed) JOHN W. Christy, Clerk."

Mr. Jensen: We offer the answer of the National Surety Company, commencing at page 14, and continuing to page 22, that is, with the exhibits; we are offering the exhibits that are part of the pleadings in each case.

97 (The part of the former record designated and offered is in words and figures as follows:)

"Answer of National Surety Company to Interpleader.

(Filed in U. S. District Court on May 14, 1924.)

Comes now the National Surety Company, a Corporation, interpleaded herein, and for its answer to plaintiffs' complaint, admits, denies and alleges as follows:

1. Admits paragraphs 1, 2, 3, 4 and 5 of plaintiffs' complaint.

2. Denies each and every allegation contained in paragraph 6 of said complaint.

Further answering said paragraph, the National Surety Company alleges that if such an assignment was made to said American Surety Company by Salt Lake County, the same is illegal, void, without authority of law and of no effect.

Replying to the so-called 'Separate And Additional Defense And Interpleader' of the defendant, Edward E. Jenkins, Receiver, the National Surety Company admits, denies and alleges as follows:

1. Admits paragraphs 1, 2, 3, and 4 of said so-called separate and additional defense and interpleader.

2. Denies paragraph 5 of said so-called separate and additional defense and interpleader.

In accordance with the order of interpleader made herein by the above entitled court, rquiring the National Surety Company to set forth its rights to said sum of $56,809.42, it alleges as follows:

1. That at all times herein mentioned, the National Surety Company of New York, was and is a corporation of the State of New York, and at all times herein mentioned, has been, now is, lawfully authorized to engage in the surety business within the State of Utah.

2. That at all times herein mentioned, Salt Lake County was and is, a county organized and existing under the laws of the State of Utah, with power to sue and be sued, and that the plaintiff, E. J. Groesbeck, was during all the times herein mentioned, and now is the duly elected, qualified and acting county treasurer of Salt Lake County, Utah, and as such, among other things, was required by the laws of Utah to receive all moneys belonging to the County, and all other public moneys by law directed to be paid to him, safely keep the same, and apply and pay out the same according to law, and

render an account as required by law, and to well, truly and faithfully perform all official duties required of him by law; and was further required by law to give a bond to Salt Lake County in the penal sum of $200,000.00 for the faithful performance of his official duties as such officer, and to secure the acounting for, safe keeping and application of all moneys or other property that came into his hands as such officer.

3. That on or about the 3rd day of January, 1921, the said E. J. Groesbeck as said County Treasurer, furnished and filed as provided by law, his official bond with the American Surety Company of New York thereon as surety, for the penal sum of Two Hundred Thousand ($200,000.00) Dollars, which was conditioned as follows:

'The Condition Of This Obligation Is Such, that Whereas, the above [bounded] principal has been duly elected to the office of County Treasurer in and for Salt Lake County, for a term beginning January 3rd, 1921.

'Now Therefore, if the said Edward J. Groesbeck shall well, truly and faithfully perform all official duties now required of him by law and also such additional duties as may be imposed on him by any law of the State, subsequently enacted, and if he shall account for and pay over and deliver to the person or officer entitled to receive the same, all moneys or other property that may come into his hands as such County Treasurer, then this obligation to be null and void, and of no effect; otherwise to be and remain in full force and virtue."

4. That the defendant, Edward E. Jenkins, is and
98 was during all the times herein mentioned since on or about the 17th day of January, 1922, the duly appointed and acting Receiver of the National City Bank of Salt Lake City, Utah; that the said National City Bank of Salt Lake City, Utah, was a national banking association duly organized and existing under and by virtue of the National Banking Act, with its office and principal place of business at Salt Lake City, Utah.

5. Alleges that the said E. J. Groesbeck, as such County Treasurer of Salt Lake County, collected and received for and in behalf of Salt Lake County, and the various school districts and cities therein, as well as the State of Utah, public funds in large amount, the exact amount of which is unknown to this defendant, and deposited the same in the National City Bank of Salt Lake City.

6. That prior to the 17th day of January, 1922, and to-wit: on the 3rd day of January, 1921, the National Surety Company of New York furnished its depository bond in the sum of $125,000.00 to protect Salt Lake County against loss in said amount on account of the deposit of its funds in the said National City Bank; that said bond was executed by the defendant, National Surety Company, at the request of said National City Bank and said E. J. Groesbeck.

7. That on the 17th day of January, 1922, said National City Bank closed its doors and went into the hands of defendant, Edward E. Jenkins, receiver, appointed by the Comptroller of Currency of the U. S., and at said time, said County Treasurer and said County had on deposit with said Bank, public funds belonging to the State of Utah, Salt Lake County and the various subdivisions thereof, in the sum of $643,094.29; that upon the failure of said bank, the National Surety Company of New York paid over to said Salt Lake County, the sum of $125,000.00 being the penal sum of its said depository bond, and by reason of its payment of said sum as aforesaid to Salt Lake County, it became by operation of law and is entitled to be subrogated to the amount of such payment to the rights and claims of Salt Lake County, and E. J. Groesbeck, its treasurer, against said National City Bank and this defendant, as its receiver; that by reason thereof, it has been ever since said payment, and now is, entitled to receive its pro rata share of any and all dividends to be paid by the defendant on account of the deposit of said County money. That said sum of $125,000.00 was paid by said National Surety Company to Salt Lake County and E. J. Groesbeck, its treasurer, and received by them without prejudice to the claim of said National Surety Company to subrogation pro tanto to the rights of Salt Lake County against said National City Bank and its receiver; said question being left open for future determination. That on or about June 5th, 1922, and prior to its payment of said sum of $125,000.00 to Salt Lake County, the National Surety Company, as a condition precedent to said payment, requested that the Board of County Commissioners of Salt Lake County pass a resolution to said effect, which resolution was thereupon duly passed prior to the receipt of said payment; that a copy of said resolution is hereto annexed, made a part hereof, and marked Exhibit "A". That on or about June 5th, 1922 and prior to its payment of said $125,000.00 the National Surety Company, as a condition precedent to said payment, requested and received from said E. J. Groesbeck a letter to the same effect, a true

copy of which letter is hereunto annexed, made a part hereof, and marked Exhibit "B".

8. That after the failure of said National City Bank on said 17th day of January, 1922, the National Surety Company learned for the first time that said E. J. Groesbeck had failed to comply with the provisions of Section 4500 Comp. L. of Ut. 1917, by requiring from said bank full and complete depository protection as required by said Section; and that the only depository bonds exacted or required by said Groesbeck of said National City Bank was the depository bond of the National Surety Company in the sum of $125,000.00, the bond of the Massachusetts Bonding Company in the sum of $25,000.00 and the bond of the Fidelity & Deposit Company of Maryland in the sum of $75,000.00, aggre-
99 grating in all the sum of $225,000.00; that said E. J. Groesbeck did, however, accept from said National City Bank $360,000.00 par value of bonds of the Crystal Lakes Farm Lands Company, which bonds at the time they were received by him were not, and at no time since have been worth as much as ten cents on the dollar; that the American Surety Company has asserted and claimed and now asserts and claims it is entitled to the said $360,000.00 par value bonds of the Crystal Lake Farm Lands Company, to the exclusion and injury of the defendant, National Surety Company, and is now endeavoring to and will sell the same for its own use and benefit unless restrained by this court.

9. That by reason of the failure of said E. J. Groesbeck to comply with the provisions of said Section 4500 Comp. L. of Ut. 1917, the plaintiff, the American Surety Company, the surety upon his said official bond, became liable to Salt Lake County for the full penalty of its bond in the sum of $200,000.00, which payment was resisted by it, and that thereupon, suit was instituted against it by Salt Lake County in the District Court of the Third Judicial District of Salt Lake County for the sum of $200,000.00 together with interest thereon from the date of demand; that judgment was thereafter duly rendered against said American Surety Company, and in favor of Salt Lake County, for the said sum of $200,000.00 and interest, and thereafter said American Surety Company appealed from said judgment to the Supreme Court of the State of Utah, which judgment was affirmed by the said Supreme Court in the month of February, 1924, and thereafter the said American Surety Company paid to Salt Lake County the said sum of $200,000.00 and interest; the said Supreme Court of the State of Utah holding in effect

that the loss of the funds of Salt Lake County was occasioned by the failure of E. J. Groesbeck, as County Treasurer, to perform the duty enjoined upon him by law, to require from the said National City Bank sufficient depository protection to fully protect the public funds so deposited by him, and holding and finding in effect, that said bond of the American Surety Company was, and is, a depository bond insuring the safe keeping of the funds of Salt Lake County.

10. The defendant, National Surety Company, further alleges that if the said E. J. Groesbeck had complied with said Section 4500 Compiled Laws of Utah 1917, his surety, the American Surety Company, would have suffered no loss; but that he failed to so comply with the law, and his surety, the said American Surety Company, knowingly suffered and permitted him to violate the said law as they well knew, that he did not have sufficient depository protection to cover the public funds so deposited by him in said Bank; that because of the failure of the said Groesbeck to take, and the failure of the said American Surety Company to require him to take sufficient depository protection, the American Surety Company suffered a loss, for which it now seeks to reimburse itself at the expense of the National Surety Company; that equity and good conscience will not permit the said American Surety Company to make use of such illegal and wrongful act on the part of its principal to establish a right to dividends to the exclusion of, or superior to that of the National Surety Company.

11. The defendant, National Surety Company, alleges that by reason of its payment of the obligation on its bond of $125,000.00 to Salt Lake County, it became, and is by reason of such payment and by operation of law, and in justice, equity and in good conscience, entitled to subrogation in said amount as against the receiver of its principal; and the American Surety Company is entitled to subrogation and reimbursement only as against its principal, the said E. J. Groesbeck, which right, it is enforcing; that this defendant, National Surety Company, has no remedy as against the said E. J. Groesbeck, but must look wholly for indemnity to the funds of its principal, the National City Bank.

12. This defendant further alleges that the said National City Bank, in its written application to this defendant for said depository bond in the sum of $125,000.00, and as
100 a consideration for the issuance of said bond, promised and agreed to hold the said National Surety Company harmless, and to indemnify and reimburse it for any

loss which it might sustain by reason of its execution of said bond and following its payment to Salt Lake County of the penalty of said bond in the sum of $125,000.00, the National Surety Company duly presented its claim in said amount arising out of said bond to said defendant receiver.

13. That heretofore, and prior to the commencement of this action, the National Surety Company duly transferred and assigned to the American Indemnity Company of Texas, a corporation, $5,000.00 of its claim of $125,000.00 hereinbefore set forth.

Wherefore, the defendant National Surety Company, prays that the above entitled court make its Order, Judgment and Decree as follows:

1. That the plaintiff, American Surety Company take nothing by reason of its complaint herein.

2. That it be Ordered, Adjudged and Decreed that the plaintiff American Surety Company, is not entitled to said sum of $9,143.41 of said dividend now declared and held by said receiver, or any part thereof, and further that it be Ordered, Adjudged and Decreed that said American Surety Company is not entitled to receive any dividends declared or accruing in the hands of said defendant receiver by reason of the deposit of said public funds in said bank.

3. That it be Ordered, Adjudged and Decreed that the said American Surety Company has no right, title, interest or claim whatsoever in and to the said Crystal Lakes Farm Lands Company bonds, or the proceeds thereof, or any part thereof.

4. That it be Ordered, Adjudged and Decreed, that the National Surety Company is entitled by subrogation and operation of law, to its pro rata share of said $9,143.41 of the dividends now declared and held by said defendant receiver together with its pro rata share of all dividends declared by the defendant receiver by reason of the deposit of said public funds in said bank together with its pro rata share of said Crystal Lake Farm Lands Company's bonds.

5. That the claim of the National Surety Company against said defendant receiver in the sum of $125,000.00 arising out of the promise and agreement of said National City Bank to indemnify and to hold said National Surety Company harmless and to reimburse it for any loss on account of its execution of said bond in the sum of $125,000.00 be allowed and approved and the defendant receiver ordered to pay to said National Surety Company dividends thereon.

6. That the defendant, National Surety Company, have its costs herein incurred.

7. That the court make such further and other order herein as may be just and equitable.

ARTHUR E. MORETON,
Attorney for Defendant
National Surety Company.

State of Utah,
County of Salt Lake—ss.

Fred E. Moreton, being first duly sworn on oath, deposes and says: That he is an officer, to-wit, Resident Assistant Secretary of the National Surety Company; as such officer he is its agent and makes this verification for and on its behalf; that he has read the above and foregoing answer; knows the contents thereof, and the same is true, except as to the matters therein alleged upon information and belief, and as to those matters he believes it to be true.

FRED A. MORETON.

Subscribed and sworn to before me this 13th day of May, A. D. 1924.

(Seal)

ARTHUR E. MORETON,
Notary Public. Residing at Salt Lake City, Utah.

My Commission expires Apr. 18, 1927.

Due and timely service of the foregoing answer admitted this 13th day of May, 1924.

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CHENEY, JENSEN, HOLMAN & STEPHENS
Attorneys for Plaintiff.

BAGLEY, JUDD & RAY,
Attorneys for Defendant,
Edward E. Jenkins, Receiver."

"Exhibit 'A'.

Resolution.

Resolved that for and in consideration of the sum of $125,000.00 to Salt Lake County in hand paid by the National Surety Company of New York City, hereinafter called the surety, the receipt of which is hereby acknowledged, Salt

Lake County does hereby release and discharge the said surety from all liability, claim or demand under its certain bond in which the National City Bank of Salt Lake City, Utah, is principal and it is surety, bearing date on or about January 3rd, 1921, in the penal sum of $125,000.00 in favor of E. J. Groesbeck, Treasurer of Salt Lake County, Utah, conditioned for the payment of moneys deposited in said bank as in said bond provided.

Be it further resolved that in accepting said payment as aforesaid, the question of the extent of subrogation of said National Surety Company to the rights of Salt Lake County is left open for future determination, and the said payment is received without prejudice to the claim of said Surety Company to subrogation pro tanto to the rights of Salt Lake County against said National City Bank and its Receiver, as said claim is not thereby conceded by said County, said question being left for future determination."

"Exhibit 'B'

E. J. Groesbeck,
Treasurer.

Salt Lake County
Treasurer's Office

Salt Lake City, Utah.
June 5th, 1922.

National Surety Company
115 Broadway
New York City, N. Y.

Gentlemen:

In receiving your check for $125,000.00 in full payment and discharge of all liability, claim or demand under your certain bond in which the National City Bank of Salt Lake City, Utah, is principal, and you are surety, bearing date of January 3rd, 1921, in the sum of $125,000.00 in favor of undersigned, conditioned for the payment of monies deposited in said bank as in said bond provided, it is understood that the question of the extent of your subrogation to the rights of the undersigned and of Salt Lake County, is left open for future determination; it being my contention that your Company is not entitled to subrogation until and in the event I have been first reimbursed in full to the extent of my entire claim against the National City Bank, and I understand that it is your contention that your Company is entitled to sub-

rogation pro tanto immediately upon payment to me of the above amount, regardless of whether or not I am first reimbursed in full.

Your payment is, therefore, made and received as aforesaid without prejudice to your rights or contention and the question of the extent of your subrogation is therefore left open for future determination.

Yours very truly,

E. J. GROESBECK,
Treasurer, Salt Lake County."

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102 Mr. Jensen: As I understand it, Mr. Moreton, the American Indemnity Company is not a party to this litigation?

Mr. Moreton: No.

Mr. Jensen: We desire to offer the answer of the American Surety Company of New York to the complaint in intervention of the National Surety Company of New York, commencing at page 33 and continuing to page 36.

(The part of the former record designated and offered is in words and figures as follows:)

"Answer of American Surety Company of New York to Complaint In Intervention of National Surety Company of New York.

Comes now the American Surety Company of New York, a corporation, one of the plaintiffs above mentioned, and answering the complainant in intervention of the National Surety Company of New York, admits, denies and alleges as follows:

I.

Answering paragraphs 1, 2, 3, 4 and 5 of the said complaint in intervention, this plaintiff admits the allegations therein contained.

II.

Answering paragraph 6 of the said complaint in intervention, this plaintiff admits and alleges that the National Surety Company of New York, on or about the 3rd day of January, 1921, as surety, and the National City Bank of Salt Lake City, as principal, executed and delivered to E. J.

Groesbeck, County Treasurer of Salt Lake County, his depository bond in the sum of $135,000.00 in connection with, and as an inducement for the deposit of county funds in said National City Bank of Salt Lake City, by said E. J. Groesbeck as County Treasurer of Salt Lake County. This plaintiff denies each and every other allegation in the said paragraph 6 contained.

III.

Answering paragraph 7 of the said complaint in intervention, this plaintiff admits and alleges that on the 17th day of January 1922, said National City Bank of Salt Lake City closed its doors and went into the hands of Edward E. Jenkins, as Receiver thereof, appointed by the Comptroller of Currency of the United States; and admits that at said time said E. J. Groesbeck, as County Treasurer of Salt Lake County, had on deposit with said bank public county funds in the sum of $643,094.29; and admits that upon the closing of said bank the National Surety Company of New York paid over to said County Treasurer and to said Salt Lake County, the sum of $125,000.00, being the penal sum of its said depository bond; and admits that a resolution of the Board of County Commissioners and the letter of E. J. Groesbeck recite that said payment was made by the said National Surety Company without prejudice to the rights of subrogation, if any, which it might have.

This plaintiff denies each and every other allegation in the said paragraph 7 contained.

IV.

Answering paragraph 8 of the said complaint in intervention, this plaintiff admits that the aggregate of depository bonds taken by the said E. J. Groesbeck, as County Treasurer of Salt Lake County, in connection with the deposit of county funds in said National City Bank of Salt Lake City, as aforesaid, was $225,000.00; and admits that said E. J. Groesbeck, as such County Treasurer, did take, as further securities and protection for said funds, the sum of $360,000.00
103 par value of the bonds of the Crystal Lake Farm Lands Company; and plaintiff further admits and alleges that it has asserted and claimed, and now asserts and claims that its rights of subrogation as against said bonds and as against the funds of said National City Bank of Salt Lake City, are prior and superior to the rights and claims of the depository sureties including said National Surety Company of New York.

This plaintiff denies each and every other allegation in the said paragraph 8 contained.

V.

Answering paragraph 9 of the said complaint in intervention, this plaintiff admits that on account of the failure of said National City Bank, having on deposit the said public funds, this plaintiff became liable to Salt Lake County for the full penalty of its bond of $200,000.00, and for interest thereon from the date of demand; admits that suit was instituted against it for the recovery of same, and that judgment was had against it for said sum and interest; that it appealed from the said judgment to the Sureme Court of the State of Utah; that said judgment was affirmed and that thereupon and thereafter it paid to said Salt Lake County the said sum of $200,000.00 and interest.

This plaintiff denies each and every other allegation in said paragraph 9 contained.

VI.

Answering paragraphs 10 and 11 of said complaint in intervention, this plaintiff denies that said E. J. Groesbeck, as County Treasurer of Salt Lake County, failed to comply with the provisions of Section 4500 Compiled Laws of Utah, 1917, and denies that this plaintiff knowingly permitted or acquiesced in the violation of said or any law pertaining to the duties of his said office; and denies each and every other allegation therein contained except as the same are otherwise herein specifically admitted or qualified.

VII.

Answering paragraphs 12 and 13 of said complaint in intervention, this plaintiff alleges that it has no knowledge or information sufficient to form a belief as to the truthfulness of the allegation therein contained, and therefore and upon that ground denies the same.

VIII.

This plaintiff denies each and every allegation in the said complaint in intervention contained not hereinabove specially admitted, denied or qualified.

Wherefore, having fully answered the said complaint in intervention, this plaintiff prays that said National Surety Company of New York take nothing by reason of its said com-

plaint in intervention; that plaintiffs have judgment herein in accordance with the prayer of their complaint; and this plaintiff prays for such other further or different relief as to this court may seem just and equitable in the premises.

CHENEY, JENSEN, HOLMAN & STEPHENS
Attorneys for Plaintiff, American Surety Company of New York.

State of Utah,
County of Salt Lake—ss.

W. E. McKell, being first duly sworn, deposes and says: That he is an officer, to-wit: Resident Vice-President of the plaintiff corporation American Surety Company of New York, and makes this verification for and on its behalf; that he has read the foregoing Answer and knows the contents thereof; that the same is true to his best knowledge, information and belief.

W. E. McKELL

Subscribed and sworn to before me this 22 day of May, 1924.

L. E. BEUSCHELL,
(Seal) Notary Public Salt Lake City.

Copy of the foregoing Answer of American Surety Company of New York received this 22 day of May, 1924.

ARTHUR E. MORETON
Attorney for Defendant.

Filed in United States District Court, District of Utah. May 23, 1924. John W. Christy, Clerk."

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104 Mr. Jensen: We also desire to offer that part of the record commencing at page 97 of Exhibit 3, Exhibit 15 being the claim and Exhibit 16 being the claim and correspondence in connection therewith which was submitted to Mr. Jenkins, the Receiver of the National City Bank, and all that testimony following on page 97 and extending over to the bottom of page 105.

(The part of the record designated and offered is in words and figures as follows):

"Mr. Moreton: We offer in evidence what is marked Exhibit 15, National Surety Company, the same being a letter

of date August 7, 1923, from the National Surety Company to the Receiver of the National City Bank, and the reply of the Receiver to that letter, marked Exhibit 16, of date August 21, 1922.

Mr. Jensen: I understand you are offering these merely to show that you made a claim to the Receiver?

Mr. Moeton: Merely to show that we made a claim to the Receiver, and the time.

Mr. Jensen: For that purpose I have no objection.

The Court: May be received.

Exhibit 15 on the letter head of the National Surety Company, dated August 7th 1923, and attached papers offered by the defendant, National Surety Company, and received in evidence:

'In Re Bond #3206907—Cl. #20466
National City Bank
Salt Lake City, Utah.

'Receiver of the National City Bank,
Salt Lake City, Utah.

Gentlemen:

'Find enclosed our Proof of Claim against the National City Bank in the amount of $125,051.00. I am attaching thereto copy of original vouchers, copy of assignment and other papers that will substantiate our claim.

Will you please acknowledge receipt of this Proof of Claim and advise us if there is any other data that is required to satisfy your wishes?

Yours very truly,

SURETY SALVAGE DEPARTMENT
By L. C. Kelly.'

'Exhibit A.

National Surety Company,

Payee E. J. Groesbeck, as Treasurer of Salt Lake County, Address, Salt Lake City, Utah.

3/29/22 In full payment of all liability of National Surety Company under its bond dated January 3, 1921, for $125,-000.00 covering the funds of the county

of Salt Lake, Utah, on deposit in the National City Bank, Salt Lake City, Utah; it being understood by this payment the said National Surety Company is subrogated to all of said County's right, title and interest and claim of, in, to or upon the said deposit to the amount of the payment herein made....$125,000.00

105 In re: Bond 3206907—Claim—20466—
National City Bank, Salt Lake City.

Expenditure

authorized Examined by acctg. Dept. approved Entered A. M. Birdsall, J. T. M. W. J. D. E. A. St. J. Mertz. M. O. G. A. J. S.

No. 260616 New York, Mar. 30, 1922, $125,000.00

When endorsed on back, this voucher becomes a check for One Hundred Twenty Five Thousand And 00/100 * * * Dollars

In full for account as noted above.

Payable at
The National City Bank
Of the City of New York New York.

.....
Vice President.

A. H. MIDDLETON
Assistant Secretary Treasurer.

(Reverse Side of Check)

National Surety Company.
Voucher Check.

The endorsing of this voucher check constitutes a receipt in full for account as shown on reverse side. Make all endorsements below.

For deposit to the credit
of the account of the payee

(Stamp)

Pay National City Bank of
New York, or Order
June 1-1922
National Surety Company
by Joel Rathbone
Vice President

(Stamp)

Received Payment
June 1, 22
The National City Bank of N. Y.
Head Office

'E. J. Groesbeck Treasurer

Salt Lake County
Treasurers Office.
Salt Lake City, Utah.

For and in Consideration of the sum of One Hundred Twenty-five Thousand ($125,000.00) Dollars to E. J. Groesbeck as Treasurer of the County of Salt Lake, Utah, hereinafter called the 'Treasurer,' in hand paid by the National Surety Company of New York, N. Y., hereinafter called the 'Surety', the receipt of which is hereby acknowledged, the said County Treasurer does hereby release and discharge the said Surety from all liability, claim or demand under its certain bonds, in which the National City Bank of Salt Lake City, Utah, is principal and it is surety, bearing date on or about January 3, 1921, in the penal sum of One Hundred Twenty-five Thousand ($125,000.00) Dollars, in favor of E. J. Groesbeck, Treasurer of Salt Lake County, Utah, conditioned for the payment of monies deposited in said bank as in said bond provided.

106 In witness Whereof the said County Treasurer has hereunto set his hand and affixed his seal this 10th day of June, 1922, in duplicate.

E. J. GROESBECK
As Treasurer of the County of Salt Lake, Utah.

State of Utah
County of Salt Lake—ss.

On this 10th day of June, 1922, before me personally came E. J. Groesbeck, to me personally known and known to me to be the County Treasurer of Salt Lake County, Utah, and the same individual described in and who executed the foregoing instrument, and he thereupon acknowledged to me that he had executed the same.

V. P. HISKEY

State of Utah,
County of Salt Lake—ss.

E. J. Groesbeck, being first duly sworn on oath says: I am the County Treasurer of Salt Lake County, State of Utah, and as such official I caused the funds of said County to be deposited in the National City Bank of Salt Lake City, Utah, and took depository or security bonds from various companies providing for the payment of the moneys so deposited when required by him.

That among the companies giving such bonds was the National Surety Company of New York, City, New York, which gave its bond in the sum of One Hundred Twenty-five Thousand ($125,000.00) Dollars, effective January 3rd, 1921.

The National City Bank of Salt City closed its doors and suspended payments on Tuseday, January 17th, 1922, and since then has failed to have forthcoming, when required by him the moneys so deposited by him in said bank.

That the amount deposited by said E. J. Groesbeck as such County Treasurer of Salt Lake County at the time when said bank closed its doors and suspended payments was $598,117.98.

E. J. GROESBECK
County Treasurer

Subscribed and sworn to before me this 20th day of January, A. D. 1922.

LILA FOLSOM
Notary Public
Residing in Salt Lake City, Utah.'

'Jos. Wirthlin
Chairman

Salt Lake County
Commissioner

E. L. Burgon
S. J. Lindsay

Salt Lake City, Utah
June 5th, 1922.

National Surety Company of New York City
#115 Broadway
New York City, N. Y.

Dear Sir:

The Board of County Commissioners, at the meeting held this date, passed the following resolution:

'Commissioner S. J. Lindsay moved the adoption of the following Resolution:

Resolution.

'Resolved that for and in consideration of the sum of One Hundred Twenty-five Thousand Dollars ($125,000.00) to
Salt Lake County, State of Utah, in hand paid by the
107 National Surety Company of New York City, State of
New York, hereinafter called the surety, the receipt of which is hereby acknowledged, Salt Lake County, State of Utah, does hereby release and discharge the said surety from all liability, claim or demand under its certain bond in which the National City Bank of Salt Lake City, Utah, is principal and it is surety, bearing date on or about January 3rd, 1921, in the penal sum of One Hundred Twenty-five Thousand Dollars ($125,000.00) in favor of E. J. Groesbeck, Treasurer of Salt Lake County Utah, conditioned for the payment of moneys deposited in said bank as in said bond provided.

Be it Further Resolved that in accepting said payment as aforesaid, the question of the extent of subrogation of said National Surety Company to the rights of Salt Lake County, Utah, is left open for future determination, and the said payment is received without prejudice to the claim of said Surety Company to subrogation pro tanta to the rights of Salt Lake County against said National City Bank and its Receiver as said claim is not hereby conceded by said County, said question being left for future determination.

Commissioner E. L. Burgon seconded the motion of Commissioner S. J. Lindsay for the adoption of the foregoing Resolution and said Resolution on being put to a vote was adopted and passed by the Board of County Commissioners of Salt Lake County, State of Utah, the vote on roll call being as follows: Commissioner E. L. Burgon voting 'Aye'; Commissioner S. J. Lindsay voting 'Aye'; Commissioner Joseph Wirthlin voting 'Aye'.'

Passed by the Board of County Commissioners of Salt Lake County, State of Utah, this 5th day of June, A. D. 1922.

Yours very truly,

BOARD OF COUNTY COMMISSIONERS,
of Salt Lake County, State of Utah.

CLARENCE COWAN,
Clerk.
By Ida M. Holihan, Deputy Clerk.'

'In the Matter of the Estate of the National City Bank of Salt Lake City, Utah.

State of New York,
County of New York—ss.

Upton Slingluff of #115 Broadway, Burough of Manhattan, City of New York, deposes and says that he is Vice-President of the National Surety Company, a corporation, incorporated and existing under and by the laws of the State of New York, and carrying on business at #115 Broadway, Bourough of Manhattan, City and County of New York, and that he is duly authorized to make this Proof and says further that the said National City Bank of Salt Lake City, Utah is justly and truly indebted to the National Surety Company in the sum of One Hundred Twenty-five Thousand and Fifty-one and 00/100 ($125,000.00) Dollars and that the consideration for said debt is as follows:

That on or about the 1st day of January, 1921, the National Surety Company executed its bond #3206907 in the sum of $125,000.00 in behalf of the National City Bank of Salt Lake City, Utah, and in favor of the County Treasurer, at that time Edward Groesbeck, County Treasurer of Salt Lake County, Utah.

That the above bond was conditioned that the National City Bank, Salt Lake City, Utah, should at all times safely keep and have forthcoming when lawfully required all moneys of the said Obligee deposited with the said depository in the amount of One Hundred Twenty-five Thousand And 00/100 ($125,000.00) Dollars; that the said National City Bank of Salt Lake City, Utah upon demand by
108 the County Treasurer of Salt Lake County, Utah, failed to pay said sum upon demand as above set forth according to the terms of the bond; that the amount of the deposit was One Hundred Twenty Five Thousand and 00/100 ($125,000.00) Dollars and that the said Bank on or about the 17th day of January, 1922 closed its doors for business and thereafter failed to make said payment and because of its failure to pay the National Surety Company, pursuant to the terms of the said bond referred to, was obliged to and did pay to the obligee above set forth the amount of its deposit at that time in the National City Bank of Salt Lake City, Utah, as more fully appears from the attached copy of said voucher check marked Exhibit 'A' and made a part of this Proof of Claim; that on or about the

17th day of June, 1922, the National Surety Company paid the sum of Fifty-one and 00/100 ($51.00) for services brought about by the failure of this Bank, said sum of money being entirely up to the National City Bank of Salt Lake City, Utah which relieved the National Surety Company of the expenses incurred by reason of failure to car(—) bond, all of which latter sum of money more fully appears from attached copy of voucher check marked Exhibit 'B' and made part of this Proof of Claim.

That upon said payment of the above sums the National Surety Company became subrogated to the rights of the County Treasurer of Salt Lake County, Utah against the National City Bank of Salt Lake City, Utah, having about that time received assignment from the County Treasurer, Salt Lake City, Utah for the sum of One Hundred Twenty-five Thousand and 00/100 ($125,000.00) Dollars, the amount on deposit with said National City Bank of Salt Lake City, Utah. Copy of said assignment is attached hereto and marked Exhibit 'C' and made a part of this Proof of Claim.

That we attach herewith also copy of resolution by the Board of County Commissioners marked Exhibit 'D'. Also photostatic copies of other data of value in filing our Proof of Claim.

That no note has been received for said debt or any judgment recovered thereon; that no part of said debt has been paid; that there are no set-offs or counter-claims of same; that the National Surety Company has not nor has any person by its order or to the knowledge of the deponent for its use had or received any manner of securities for said debt whatsoever.

That the said National Surety Company demands that they be subrogated to the rights of the Obligee on the above mentioned bond against the funds or estate of the National City Bank of Salt Lake City, Utah, to the extent of One Hundred Twenty Five Thousand Fifty-one and 00/100 ($125,051.00) Dollars being the total amount set forth as having been paid by the National Surety Company to the Obligee and that it be reimbursed for the payment heretofore made to the Obligee as above set forth.

NATIONAL SURETY COMPANY
By Upton Slingluff, Vice President.

Sworn to before me this 4th day of August, 1922.

WM. M. WEAVER
Notary Public of New York
County, New York.'

L. C. K.

Mr. Moreton: Attached to Exhibit 15 is a photographic copy of a check for $125,000.00 release signed by E. J. Groesbeck; certificate signed by County Clerk of Salt Lake County addressed to the National Surety Company; a photographic copy of the bond is attached. I have heretofore introduced a copy of the bond, but it bore no signature. This one is a photographic copy of the original signatures. Then the claim itself, wherein it is recited that claim is made against the National City Bank for reimbursement and for subrogation.

109 Exhibit 16 was offered by the National Surety Company, and was received in evidence and is as follows:

'The National Surety Company
115 Broadway, New York City.

Gentlemen:

Re: Bond #3206907—Cl. #20466—

National City Bank, Salt Lake City, Utah.

I have yours of the 7th instant, enclosing Proof of Claim against this Trust, in the amount of $125,051.00, together with photographic copies of original vouchers, assignment and other papers in substantiation of your claim.

You may be advised that I have noted upon the books of this Receivership the facts of your payment of the sum of $125,000.00 under your bond, to E. J. Groesbeck, Treasurer of Salt Lake County.

Mr. Groesbeck advises me that he did not endorse the check, copy of which you enclose, marked Exhibit A, and I cannot find any evidence of his endorsement on the copy which you enclose. He states that payment was made without reference to the question of subrogation, that being left open for future determination. I cannot, therefore, recognize your claim as entitling you to dividends until Mr. Groesbeck shall have been reimbursed in full for his claim on this trust.

Your claim for attorney's fees, and expenses paid to Mr. Arthur E. Moreton in the sum of $51.00, is rejected. Mr. Moreton is the County Attorney of Salt Lake County, and it seems to me that services rendered by him in this regard are not a proper charge against this trust.

Very truly yours,

EDW. E. JENKINS,
Receiver."

Mr. Jensen: Mr. Moreton, in the interest of time, I suppose it may be stipulated that these pleadings I have referred to were the pleadings filed by the respective parties to the present litigation in the prior suit in this Court to which I have referred, that the claim was presented as is shown, as you proved at the prior trial, and that the claim is the claim made by the National Surety Company at that time, and that the letter is the letter of Mr. Jenkins acknowledging the receipt of that claim and reply thereto.

Mr. Moreton: Yes.

The Court: Isn't that the same claim you have introduced here?

Mr. Jensen: No, another claim has been filed here, your Honor.

Mr. Jensen: We also desire to offer the decree of this Court in the case that was tried, the pleadings to which have just been referred to, which appears at page 47 and continues over to the bottom of page 48.

110 (The part of the former record designated and offered is in words and figures as follows:)

"Decree June 12, 1924.

"In The District Court of The United States In And For The District Of Utah Central Division.

Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of said Salt Lake County, and American Surety Company of New York, a corporation, Plaintiffs,

No. 8069. vs. Law. (Equity)

Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, a national Banking association, Defendant.

National Surety Company of New York, a corporation, American Indemnity Company, a corporation, and Massachusetts Bonding & Insurance Company, a corporation, Interpleaded Defendants.

This cause came on regularly for trial on the 28th day of May, 1924, before the Honorable Tillman D. Johnson, Judge of the above entitled court. And the court having heard the evidence in behalf of all of the parties hereto, and the cause having been argued and submitted for decision, and the court being fully advised in the premises does hereby find the issues in favor of the plaintiffs, and thereupon it is ordered, adjudged and decreed as follows:

(a) That the plaintiff, Salt Lake County, have and recover from Edward E. Jenkins, Receiver of National City Bank, the sum of $47,666.01.

(b) That the plaintiff, American Surety Company of New York, have and recover from Edward E. Jenkins, Receiver of National City Bank, the sum of $9,143.41, being the balance of a dividend declared and payable on the claim of Edward J. Groesbeck, as Treasurer of Salt Lake County, against said bank, after payment of the sum hereinabove ordered to be paid to Salt Lake County.

(c) The plaintiff, American Surety Company of New York, be and it is subrogated to and entitled to succeed to the rights of said Edward J. Groesbeck, as Treasurer of Salt Lake County, and of Salt Lake County to all dividends that may become payable on the claim in the sum of $568,094.29, of said Edward J. Groesbeck, as Treasurer of Salt Lake County against said National City Bank, and is subrogated to and entitled to succeed to the rights of said Edward J. Groesbeck, as Treasurer of Salt Lake County, and of Salt Lake County, in the bonds of Crystal Lake Lands Company of the par value of $360,000.00, held by said Edward J. Groesbeck as collateral security for the deposit of said moneys in said National City Bank, until said American Surety Company of New York shall have received on account of said dividends and/or the proceeds of said bonds the total sum of $223,362.15, with interest at the rate of eight per cent per annum on the principal sum of $200,000.00 from the 29th day of February, 1924, until paid; and said Edward E. Jenkins, as Receiver of National City Bank, or any receiver of said bank, is hereby ordered and directed to pay to said American Surety Company of New York all said future dividends as the same are declared and payable on said claim against said bank until said American Surety Company of New York shall have received the amounts aforesaid; and said American Surety Company of New York

is hereby authorized to sell and/or otherwise dis-
111 pose of said bonds, and to apply the proceeds thereof toward the repayment of said amounts as aforesaid.

(d) That after said American Surety Company of New York shall have received dividends and/or proceeds from said bonds sufficient to repay to it the said sum of $223,362.15, with interest at the rate of eight per cent per annum on the principal sum of $200,000.00 from the 29th day of February, 1924, until paid, then the interpleaded defendants, National Surety Company of New York, American Indemnity Company and Massachsusetts Bonding & Insurance Company, shall participate pro rata in all further dividends declared and payable on said claim and/or all balance of proceeds from the sale or other disposition of said Crystal Lake Farm Lands Company bonds, until the amount of the claims of said interpleaded defendants, as shown by their complaints in intervention, are paid in full, and any balance thereafter remaining shall belong to the Receiver of said National City Bank.

(Signed) TILLMAN D. JOHNSON,
Judge.

Copy of the foregoing Decree received this 10th day of June, 1924.

BAGLEY, JUDD & RAY,
Attorney for Edward E. Jenkins, Receiver, Massachusetts Bonding & Insurance Co.

A. E. MORETON,
Attorney, National Surety Company of New York, American Indemnity Company.

GEORGE G. ARMSTRONG,
Attorney for Salt Lake County.

Filed in United States District Court, District of Utah, Jun 12, 1924, John W. Christy, Clerk."

Mr. Jensen: I have here a certified copy of the decision of the Circuit Court of Appeals in the same cases on appeal, that is for the case 6819, being the appeal by the National

Surety Company, and 6820, being the appeal by the American Indemnity Company. I desire to offer that.

(Said document marked Exhibit 4.)

(Exhibit 4 is in words and figures as follows:)

(Opinion.)

"United States Circuit Court of Appeals, Eighth Circuit.
December Term, A. D. 1924.

National Surety Co., Appellant,
No. 6819. vs.
Salt Lake County, et al., Appellees.

Appeal from the District Court of the United States for the District of Utah.

112 December Term, A. D. 1924.

American Indemnity Co., Appellant,
No. 6820 vs.
Salt Lake County, et al., Appellees.

Appeal from the District Court of the United States for the District of Utah.

Mr. Arthur E. Moreton, for appellants.

Mr. John Jensen (Mr. A. M. Cheney, Mr. Frank E. Holman, Mr. L. R. Martineau, Jr., and Mr. Harold M. Stephens, were with him on the brief), for appellees.

Before Lewis, Circuit Judge, and Van Valkenburgh and Faris, District Judges.

Faris, District Judge, delivered the opinion of the Court.

These cases involves the question of appellants' right to share by way of subrogation, in certain dividends in the hands of one Jenkins, and accruing from assets, which came into the hands of Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, which failed on the 17th day of January, 1922; as also the right of appellants to participate in the proceeds of certain securities in the hands of one Groesbeck. The situation and status of the parties, so far as the pleadings and the manner in which, severally, these parties got into court are concerned, are not important; but some of the facts are necessary to an understanding of the case and to its decision.

Groesbeck was the County Treasurer of Salt Lake County, Utah, and as such, executed and delivered to Salt Lake Coun-

ty on the 3rd day of January, 1921, an official fidelity bond in the sum of $200,000, with the American Surety Company as surety therein. In this bond, as aforecast above, Salt Lake County, Utah, was the obligee.

Under the permissive provisions of Sec. 4500 Comp. Laws of Utah, 1917, Groesbeck deposited the money of Salt Lake County, which came to his hands as County Treasurer, in the National City Bank, and of such funds, so held by him, there was on deposit when the bank failed, the sum of $643,094.29. The statute mentioned may be important to an understanding and disposition of the contention urged pro and con by the parties. It reads thus:

'Any public officer having public funds in his custody may deposit the same, or any part thereof, with any bank incorporated under the national banking act and doing business in this state, or with any bank or trust company incorporated under the laws of and engaged in business in this state; provided, that he requires such depository to pay interest on all funds so deposited at a rate of not less than 2 per cent per annum, and that he take from such depository collateral security or a good and sufficient surety company bond or personal bond approved by him and sufficient in amount to fully protect such funds; provided, that the cost of any official bonds required to be furnished by any public treasurer shall be paid out of the funds in the respective treasuries; provided, that the interest received under the provisions of this title by the state treasurer shall be placed in the general fund. (Sec. 4500, Comp. Stats. 1917).'

Pursuant to the provisions and conditions of the above section, Groesbeck took from the National City Bank a surety bond with the bank as principal and the appellant National Surety Company, as surety, in the sum of $125,000, and a like bond from the Fidelity and Deposit Co., in the sum of $75,000, as also a similar bond of the Massachusetts Bonding and Insurance Co., in the sum of $25,000; in each of which
113 bonds, 'Groesbeck, Treasurer of Salt Lake County, Utah', was the obligee. The Bank also put up with Groesbeck, as collateral security to further secure the payment by the bank of the money deposited therein by him as such treasurer, $360,000.00 par value of the bonds of the Crystal Lake Farms Company.

The bond of the Fidelity & Deposit Co. contained an express provision, that on the payment by it of the sum of $75,000 the amount for which it became liable as a surety, it

should receive dividends, pro rata with other creditors, out of the assets of the bank. Such dividends it has gotten and is now getting, pursuant to an assignment to it by Groesbeck and it is not complaining here. The bond executed by appellant National Surety Company had no express provision as to subrogation. The Massachusetts Bonding and Insurance, for some reason, not necessary to state, even if it were known, does not complain here.

Salt Lake County has been paid in full thus: By National Surety Company, appellant, $125,000; by Massachusetts Bonding & Insurance Co., $25,000; by Fidelity & Deposit Co., $75,000, (all paid to Groesbeck for the benefit of Salt Lake Co.); by the American Surety Co. $200,000, (paid to Salt Lake Co., obligee therein, on the fidelity bond of Groesbeck); by the sum of $170,428.28, being a 30% dividend, paid to the County by the bank's receiver, and by the sum of $47,666.01, out of a further dividend of $56,809.42, in the hands of the receiver, and now apportionable. The County's right to this sum of $47,666.01, out of the dividend now apportionable, is, it is said in the brief of appellant National Surety Co., conceded. So there are left in dispute here, only the balance of this dividend, to-wit, $9,143.41, plus participation in future dividends if any, and whatever sum may be derived from the sale of the Crystal Lake Farms bonds, the par value of which is $360,000; actual value, neither clear nor important. These bonds were assigned by Groesbeck to the American Surety Co., between whom and appellant National Surety Co. the contest here is waged. The right of American Indemnity Co., appellant in Case No. 6820, is a derivative one, dependent wholly upon recovery by the National Surety Company; so, no further reference need be made as to it, or as to its appeal till the end of the discussion.

The single question is, whether, upon the facts stated, the law and equities give these remaining dividends and the proceeds of the Crystal Lake Farms bonds, after the county has been paid in full, to the appellant National Surety Co. or to the appellee, American Surety Co. The learned trial Court held, that the American Surety Co. is entitled to all funds derived and to be derived from such dividends and bonds, till it shall have been paid the sum of $223,362.15, the total sum paid by it on its fidelity bond, including interest, and with interest on the basic sum, at the rate of 8%, from February 29, 1924, and that the appellant, National Surety Co., shall be postponed in participation in such funds till the appellee, American Surety Co., shall have been paid in full.

The correctness of this decree is assailed by appellant, and such correctness of it is in various allegations assigned as error, for that it is contrary to law and equity.

It is conceded by counsel for appelleee that the money which Groesbeck deposited in the bank was held by him in trust, for Salt Lake County; but it is insisted by appellee that the situation and the conditions of the several bonds and the legal obligations created thereby, had the ultimate effect to make Groesbeck the debtor of the county, and to make the bank the debtor of Groesbeck. In short, that when Salt Lake County turned over to Groesbeck the sum of $643,000 (in round sum) Groesbeck became indebted to the County in that sum, and when Groesbeck deposited this same $643,000 in the bank, the latter became indebted to Groesbeck in that sum. From this premise it is insisted that it follows that Groesbeck, having taken some precaution to secure the payment back to him by the bank of this $643,000, in that he required his debtor to give a bond with the National Surety Co. and others as sureties, and to put up as further security bonds of the Crystal Lake Farms Co., is entitled to be paid in full, either by the bank from the dividends out of its wrecked assets, from the bonds of the depository sureties, or from the collateral securities in his hands, or, if so much shall be required, from all these several sources. And that when
114 Groesbeck shall have been paid in full by the bank, or its sureties (the appellant, and its associates on the depository bonds) then Groesbeck will owe the appellee, American Surety Co., such sums as it shall have been compelled to pay for him as a guarantor, or surety for his fidelity. Appellants, in effect, contend contra.

The correctness of this insistence seems plausible if not indisputable. But the contention is strenuously made by appellants that the County, the cestui que trust, have been paid in full, what remains should be equally divided between those who thus made the county whole. We think this contention, in a manner begs the question, for that it leaves out of consideration the conceded fact that appellant, National Surety Co., and its associates, the so-called depository sureties, did not pay by $200,000 all that the bank owed to Groesbeck, or that Groesbeck owed to the County, though concededly they did pay the full sums of their several obligations. The appellee, American Surety Co., under its direct obligation to the county, paid the county the sum of $200,000, with interest, and

the dividends and the Crystal Lake Farms bonds now here in dispute, are to the extent of $200,000 relieved from use to that end.

The rule applicable to this situation seems to be fairly well settled. The rule is that 'The right of subrogation cannot be enforced until the whole debt is paid. And until the creditor is wholly satisfied there ought to be and can be no interference with his rights and his securities which might, even by bare possibility, prejudice and embarrass him in any way in the collection of the residue of his claim.' (New Jersey Etc. R. R. vs. Wartendyke, 27 N. J. Eq. 658.)

To the same effect is the case of Knoffl vs. Knoxville Etc. Co., 182 S. W. 232, wherein it is said, 'A surety is not entitled to subrogation until the debt is paid in full, the creditor in the meantime is left in control of the debt and all the remedies for collection. A pro tanto assignment, or subrogation will not be allowed. The reason is that subrogation is a creature of equity and will never be allowed to the prejudice of the creditor. Harlan vs. Sweeny, 1 Lee 686; Gillian vs. Esselman, 5 Sneed 86; 37 Cyc. 408.'

The confusion in the case at bar arises from a mistaken view as to the identity of the actual creditor of the bank, as also the identity of the company, the money of which in part made this creditor whole. The Case of American Surety Co. vs. Bank 292 Fed. 609, largely relied on by appellant, furnishes no comfort to the contention made. The rule deducible from the cases is, that till the creditor is paid in full, no right of subrogation exists in favor of sureties who pay a part of the debt. In short, the creditor may insist on getting his full pound of flesh before others are allowed to sit at the banquet board.

If the bond of appellant National Surety Co. had been made to the county of Salt Lake, as obligee, or if Sec. 4500 supra, of the statutes of Utah, had required it so to be made, or perhaps even if the above section had made it absolutely obligatory upon Groesbeck to put the money of the county in some bank, there might be some force in the contention here urged. But the policy of the law of Utah seems, on casual view to render the county treasurer absolutely liable to the county for the repayment to the county of all money belonging thereto, which may come to his hands as such treasurer. He is merely permitted to deposit such money in a bank, but without by so doing, being able to shift the primary obligation for repayment from himself directly to the bank. We cannot

see that the fact, that in some aspects the money so deposited is, by the bank, held as a trust fund for the county, has the effect to make the county upon all views the creditor of the bank. The treasurer is yet the debtor of the county, and the bank is the debtor of the treasurer.

We are not convinced that there is any force in the contention that the treasurer was negligent in taking the collateral security mentioned in the record. From an examimnation of the record it does not seem to be proven whether this collateral was or was not, when taken, worth less than par. If it was worth par, and the evidence in the record is too indefinite to determine whether it was or not, then the sum of the so-called depository bonds and this collateral security
115 so nearly equalled the amount which the treasurer ought to have had on deposit, as to preclude the notion of negligence in failing to take sufficient security. If the sum so on deposit was more by $50,000 than the books of the treasurer showed, and this seems to be conceded, this difference was clearly due to the fraud of the bank which was the principal of the appellant, National Surety Co., on the depository bond.

Concretely, this contention of negligence is bottomed upon the views, (a) that the amount on deposit when the bank failed exceeded the sum total of the security held by Groesbeck from the bank, and thus was not in compliance with the statute quoted, and (b) that a part of this security, namely, the bonds of the Crystal Lake Farms Co., were not worth par, and again Groesbeck violated the statute. But while the evidence is not clear touching whether or not these bonds were worth par, yet it makes no difference in the case. This for the reason that the cashier of the bank assured Groesbeck that these bonds were worth par, and on this assurance he took them, and so the alleged negligence of Groesbeck was induced by the misrepresentations of appellant's principal. Again, whatever difference exists between the sum of the deposit and the sum total of the security held by Groesbeck, arises from the fraudulent conversion by the bank of $50,000, which had the effect to make the deposit $50,000 more than Groesbeck's books showed it to be. This difference was due to the bank's fraudulent failure to pay the above sum on orders from Groesbeck, which sum it ought to have paid and which Groesbeck believed it had paid. Obviously, the bank cannot complain of its own fraud, nor can its surety, for ordinarily 'a surety cannot be placed in a more favorable position than the principal.' (37 Cyc 429).

Lastly, it is contended that appellee, American Surety Co., ought not to have been allowed interest in the sum of $23,362.12, which accrued pending its resistance by litigation of its liability to pay at all. Abstractedly, the contention is interesting and seems to smack of justice, at least of that variety called in literature poetical justice. But concretely, this casual view is found not to be well taken in point of natural justice and equity and in view of the situation existing. For, while the appellee was resisting its liability to pay the amount of its fidelity bond, the matter of the winding up of the wrecked bank's affairs was also pending. Only shortly has enough been gotten from this wreck to pay out of dividends the balance due the county. Save the sum of about $9,000, around which, in part, the instant controversy rages, no fund has yet appeared out of which either party disputing here could have gotten one cent. So, plainly, the situation falls into the category denominated in homely vernacular, 'six of one and half a dozen of the other.' In other words, if interest had not accrued while the appellee was resisting by litigation its liability to pay its bond, the identical interest here involved would have accrued from the time of any voluntary payment to the date of the decree below. So, the fact of recalcitrancy, necessitating litigation, has in no wise affected the matter of interest, or the amount thereof. Interest would have been due the appellees in either event. Therefore, in the final analysis, this contention is but a corollary of the question already discussed and ruled against the appellants.

We are constrained to conclude that the decrees of the trial court were right as to both appellants, and that such decrees ought to be affirmed, and so we order.

Case No. 6819 affirmed.

Case No. 6820 affirmed.

Filed March 27, 1925.

A true copy.

Attest:

(Seal) E. E. KOCH,
Clerk U. S. Circuit Court of
Appeals, Eighth Circuit."

Mr. Jensen: Can it be stipulated between us that the National Surety Company which is plaintiff in the pres-
116 ent case is the same National Surety Company which was a party to the previous litigation to which I am referring; that Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, is the same Edward E. Jenkins, —and the same National City Bank,—in the prior litigation as is involved in the present litigation; and that the American Surety Company and E. J. Groesbeck, who are involved in the present litigation, are the same parties who were involved in the prior litigation.

Mr. Moreton: We admit that, without admitting its materiality.

Mr. Jensen: We also desire to offer that part of Exhibit 3 commencing at page 83 and continuing over to the top of page 89.

(The part of the former record designated and offered is in words and figures as follows:)

"Mr. Moreton: Perhaps in logical order, I should have shown our application for the bond and the bond first, I will do so at this time. We offer Exhibit 13, the same being a copy of the original application of the National City Bank to the National Surety Company for this bond in the sum of $125,000.00.

Mr. Jensen: We make no objection to the application on the ground that it is a carbon copy, but we do object to it on the ground it is immaterial, irrelevant and incompetent, but our objection does not go to the effect that the application is a copy.

The Court: Objection may be overruled.

Mr. Jensen: Exception.

(Exhibit 13 is in words and figures as follows:)

'Notice; Agents' acts not binding on Company unless within Agents' written limits of authority.

'Safety First'

National Surety Company.
Capital and Surplus over $8,000,000.00.

Under Chapter 340 of the Laws of 1912 of the State of New York, any person obtaining property or credit by use of a

false statement is guilty of a misdemeanor punishable by fine or imprisonment or both.

Application By A Bank or Trust Company For Depository Bond National Surety Company:

Application is hereby made by the undersigned for a bond the amount and tenor of which are herein set forth.

1. Name and location of Bank or Trust Company. (Give correct corporate title) National City Bank of Salt Lake City, Utah.

2. Name of Obligee to whom bond is to run Edw. J. Groesbeck, County Treas.

3. Amount of bond $125,000.00.

4. Maximum amount of deposit bond is required to secure $125,000.00.

5. (a) Specify rate of interest to be paid 2½. (b) Moneys covered by this bond: County.

6. Date from which bond is required: Jan. 1, 1921.

7. Date upon which bond is to terminate Dec. 31, 1922.

8. Do you agree to pay $625.00 premium annually: Yes.

9. When was Bank or Trust Company incorporated and under the laws of what State was the incorporation had? Utah—1912.

10. Date of beginning business Feb. 1913. If reorganized, state when .....

117 11. Authorized Capital $250,000.00.

12. Amount of Stockholders' liability, if a State Bank $.....

13. When was last dividend declared, paid and amount:

14. When was the last examination made by National or State Bank Examiner? Nov. 29, 192...

15. Do you belong to the Clearing House Association? Yes.

15a. If not, why do you not belong to the Association?

16. Give names and titles of the officers who give continuous personal attention to the affairs of the Bank or Trust Company.

Name	Titles
Frank Pingree	Cashier
W. G. Goodart	Asst. Cash.
Geo. N. Lambourne	President
J. P. Gardner	Vice-Pres.
Henry J. Wallace	" "

17. By whom are the loans of the Bank or Trust Company directly authorized?

18. The following is a true financial statement of said Bank or Trust Company, showing its resources and liabilities at the close of business on the 22nd day of Dec. 1920

Resources

Loans and Discounts	2129631.70	
Amount of above loans to directors		
What amount secured by collateral $60550.00		
Amount of above loans to officers, not directors, approved by directors		
What amount secured by collateral		
Overdrafts, secured, $.....;		
unsecured, ...;		3262.31
U. S. Bonds to secure Circulation...	250000.00	
U. S. Government, State & Municipal bonds		1327227.12
Other stocks, bonds, mortgages		
Banking House, $.....:		
Furniture & Fixtures		100000.00
Other Real Estate owned		
Due from approved Reserve Agents	476236.47	
Due from other Banks and Bankers	521313.10	
Checks and other Cash Items	20992.73	2118542.30
Fractional Currency, Legal Tender Notes, Specie, Etc.		
Total		
Other Resources		12500.00
Total Resources		5941163.43

Liabilities.

Capital Stock paid in	250000.
Paid in Surplus, Earned Surplus	55000.
Undivided Profits	9211.95
National Bank Notes Outstanding	246100.00
Due to Banks	324693.76

Individual Deposits subject to check		
Time Certificates of Deposit		
Savings Deposits Postal	65558.87	
Other Deposits	4112756.34	5063320.92
	Total	
Dividends unpaid		777842.51
Notes and Bills rediscounted		100000.00
Bills Payable		
Total Liabilities		5941163.43

118 19. State rate of interest paid on various classes of deposits Ind. Dep. 2½ per cent—Time certif. of dep. 4 per cent—sav. Dep. 4 per cent—Other deposits 4 per cent.

20. Specify Town, City, County and other public or special deposits:

Depositor:	Amount Deposited:	Rate Int. Per Cent:	Surety Bond:	Amt. of Bond.	Date of Expiration

21. Do officers and employees give Corporate Surety Bonds? Blanket Bond. Give name of Surety U. S. F. & G. Co. Expiration Date .....

22. Does Bank carry Burglar Insurance? Yes. Amount: 150,000 Name of Company: Nat'l Surety: Expiration 1922-1923.

23. How much past due paper are you carrying? None.

24. If a National Bank state whether you are on the Comptroller of the Currency's special list: Yes.

This Agreement, made between National City Bank (hereinafter called the Depository,) and the National Surety Company (Hereinafter called the Company).

Witnesseth:

Whereas, the company has executed, or is about to execute for the Depository, the bond described in the foregoing application, which application is hereby referred to and made a part of this Agreement;

Now, Therefore, in consideration of the execution of said bond and the sum of One Dollar paid to the Depository by the Company, the Depository covenants and agrees with the Company as follows:

1. That all declarations and answers made in the foregoing application are true, and that the same are made for

the purpose of inducing the Company to execute the Bond applied for without demanding collateral security from the Depository.

2. That the Depository will pay to the Company, or its duly authorized Agent, the premiums agreed in said application to be paid.

3. That the Depository will, at all times, indemnify and keep indemnified the Company and save it harmless from and against all claims, demands, liabilities, costs, charges, and expense of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost charge, expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.

4. That the Depository will immediately notify the Company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or the commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge by reason of the execution of said Bond.

5. That the Depository will, on request of the Company, procure the Company's discharge from liability under said bond, and the Company shall, at its option, have the right to the use of the Depository's name, and to all the rights and privileges of the Depository, and at any time shall have the right to be discharged from liability for the further default of the Depository and to require the Depository to account and give new surety or sureties.

6. That vouchers or other evidence of payment by the Company in discharge of any liability under said Bond shall be prima facie evidence against the Depository of the fact and amount of the Depository's liability to the Company.

7. That the Company shall have the right to look to and rely upon the property of the Depository, and its in-
119 come and earnings, and to follow and recover out of the Depository's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof, for anything due or to become due the Company under this Agreement, the execution of said Bond by the

Company being for the Depository's special benefit and protection of the Depository's property, its income and earnings.

8. That the acceptance of this agreement, and of the depository's agreement to pay premiums for the execution of said Bond, or the acceptance at any time by the Company of other securities, shall not in any way abridge or limit the right of the Company to be subrogated to any right or remedy or limit any right or remedy which the Company might otherwise have, acquire, exercise or enforce, and the Company shall have every right and remedy which the individual surety acting without compensation would have.

9. It is understood and agreed that the Company reserves the right to decline to issue the bond for which application is hereby made, and that no claim may be made against the Company in consequence of its failure to execute such bond; nor shall any claim be made in case the bond, executed, be not accepted by or on behalf of the obligee.

In Witness Whereof, the Depository, by authority of its Board of Directors, or Trustee, has caused this agreement to be duly signed by its President and Cashier or Secretary, and its corporate seal to be thereto affixed this ..... day of ....., 19.....

In Presence of

NATIONAL CITY BANK OF SALT LAKE CITY.
Give Name of Bank.
By J. P. Gardner, President.

Attest:
Frank Pingree, Cashier.

(Affix Corporate Seal)."

Mr. Jensen: Can we stipulate, Mr. Moreton, that the Indemnity Agreement of the National City Bank to the National Surety Company there set out is the same Indemnity Agreement which you are now suing upon and that the bond which follows it on page 89 given in connection with that Indemnity Agreement is the bond under which you made the payment which you are now claiming entitles you to share as a creditor, because of the Indemnity Agreement?

Mr. Moreton: That is true.

Mr. Jensen: We offer those parts of Exhibit 3 to which I have referred.

Mr. Moreton: Plaintiff objects to them on the ground that they are immaterial, irrelevant and do not form or constitute in any manner a defense to the action herein sued upon, but I do not object on the ground that it is a copy.

The Court: Same ruling as heretofore made.

Mr. Moreton: Save an exception, and may it be considered that those have been offered separately and that our objection and exception goes to each offer separately?

The Court: That may be so understood.

120 Mr. Jensen: We make the offer of Exhibit 4.

Mr. Moreton: Same objection.

The Court: Same ruling. You may have an exception.

Cross-Examination of Mr. Jenkins

By Mr. Moreton:

Sixty per cent has been paid in dividends on the deposit of the funds of Salt Lake County in the National City Bank. The first dividend of twenty per cent was paid on September 7, 1922 amounting to $113,618.84, the second dividend of ten per cent was paid February 27, 1923, the third dividend of ten per cent was paid on October 5, 1923, the fourth dividend of ten per cent in May. 1924, and the fifth dividend of ten per cent, making a total of sixty per cent in all, was paid in April, 1925. These dividends amounted in all to $340,856.52. In addition to these dividends paid on account of this indebtedness to Salt Lake County, the Fidelity & Deposit Company was paid dividends on the same dates and in the same percentage, aggregating sixty per cent of $75,000.00, or $45,000.00. No other company has been paid anything on account of Salt Lake County. It is a fact that there has been paid on account of the indebtedness evidenced by the certificate for the full amount of the deposit, the sum of $125,000.00 by the National Surety Company and the sum of $25,000.00 by the Massachusetts Bonding & Insurance Company. This certificate that is outstanding on account of this deposit of the public funds of Salt Lake County, amounting at the time of the failure of the bank, to some $643,000, was issued by me as Receiver to E. J. Groesbeck, County Treasurer of Salt Lake County. There are certain endorsements on the certificate in red ink, but without the certificate I cannot tell you what these endorsements were that were placed there under the advice of my counsel.

Redirect Examination

By Mr. Jensen:

Of the dividend of October 5, 1923, of ten per cent, amounting to some $56,000, $47,666.01 went to Salt Lake
121 County to pay it off, and the balance of that dividend in the sum of $9,143.41 was deposited in Walker Brothers Bank under stipulation of all the parties, to await the outcome of the appeal in the prior case. The next dividend of ten per cent in May, 1924, was likewise deposited in Walker Brothers Bank under that stipulation, as was also the ten per cent dividend in April, 1925. So that there was deposited in that bank to await the outcome of the litigation between these parties in the prior suit, two dividends of some $56,000 each and the balance of the previous dividend of $9,143.41, making a total of $122,762.40. Outside of that money, no other money has been paid to either Mr. Groesbeck or the American Surety Company as a result of the judgment of this court.

Recross Examination

By Mr. Moreton:

About the time that I was ready to pay this third dividend on October 5, 1923, in the sum of $56,809.42, there was a claim made by the American Surety Company that it was entitled to be paid the balance of dividends on this deposit thereafter to be declared and paid by me after the County had first been paid the sum of $47,666.01 to make it whole. I am hazy about whether that claim was made directly to me or not, but it was a contention made by them that they were entitled to this money. In my answer in this former case, I set forth the fact that I didn't know to whom this money should be paid, and asked the court to determine to whom these dividends should be paid on this deposit.

W. E. McKell, a witness for the defendants, was sworn and testified on direct examination as follows:

My name is W. E. McKell and I am manager of the branch office of the American Surety Company at Salt Lake City, Utah. After the Supreme Court of the United States had denied the Petition for Writ of Certiorari in the prior suit, the amount of money which had been deposited in Walkers Bank together with the interest, was computed and I wired my company to draw upon Walkers Bank for a specified sum.

122 The total amount of the dividends deposited with the bank was $122,762.75 and interest $3017.47; total amount which I asked the company to draw $125,780.72. Neither I nor the American Surety Company have received any other moneys from the Receiver of the National City Bank than those moneys. That money is just in the process of being withdrawn from Walker Brothers Bank. The first draft came in yesterday, it was a draft to the reinsuring company that was presented there yesterday. The first certificate of $65,952.83 was put in the bank on 3, 6, 9, 12 months; as I recall it was November 8th.

I have computed the amount of principal and interest due under the decree of this court to the American Surety Company up until today. The interest at eight per cent on $200,000.00 from February 29, 1924, is $28,098.63. That plus the original jdgment of $223,362.15 is a total of $251,460.78. The company has received the dividends and the interest which I have just referred to of $125,780.72, leaving a balance due on the judgment of $125,680.06.

Exhibit 7 is a copy of the application which I received from Mr. Groesbeck for the bond under which the American Surety Company made payment of $223,000 odd dollars. The application is dated November 17, 1920, the term began January 2, 1921 and expired January 2, 1923. As a result of that bond we made that payment.

Mr. Jensen: I offer Exhibit 7.

Mr. Moreton: We object to it as incompetent, immaterial and irrelevant and not within the issues, not being pleaded and it forms no proper defense or any defense. We make no objection because it is merely a copy.

The Court: The objection will be overruled.

Mr. Moreton: Save an exception.

(Exhibit 7, offered and received in evidence, is in words and figures as follows:)

"This Form to be Used For Officers Whose Chief Duty is Handling Money.

123 American Surety Company of New York
Principal Offices 100 Broadway
Capital $5,000,000.

Bond No. 433233A
Branch Office at Salt Lake, Ut
Sub. Agency at S. L. C. No...
Agency Co.
Amount of Bond $200,000
Premium for term $1282.50
annum $675.00
Premium for term $1282.50
Period 1-3, 1920, to 1-3, 1921.

Company's Home Office Building.

Application for Bond

Public Officers and their employees (Including Federal Officers.)

Application of Edward J. Groesbeck. (Give name in full.) Office, County Treasurer. Date, Nov. 17, 1920. Employer Salt Lake County. (Give date of appointment or election) (United States, State, County, Village, etc.)

Term begins Jan. 2, 1921. Amount of Bond.....

Effective date, Jan. 2, 1921.

Term expires Jan. 2, 1923. Bond in favor of Salt Lake County.

1. Where and when were you born? Place, Salt Lake City, Date, Dec. 29, 1880.

2. If foreign born, how long resident of United States. Since (Date) ....., 1.....

3. If not now a citizen of the United States, then of what country?

4. If a naturalized citizen of the United States, state date of naturalization, where, and in what court. Date....., in (Name of Court)....., Court at (place and State).....

5. Present locality of residence (Give residence address Street and number where possible) 1013 Blain Ave. Office Address 105 So. State. How long a resident of said city or town? Since (Date) about Dec. 29, 1880.

6. Single? Are You Married? Yes. A Widower..... Number of children none How many self supporting and live apart from you?..... How many with you .....

If others depend upon you for support, give names.

6a. If married give name and address of your wife.

7. How long have you occupied the office for which this bond is required?

8. What yearly income will you receive from your office? (State whether salary or fees.) $3300.00—salary.

9. If any other allowances will be made to you, or salary is subject to any deduction, state particulars.

10. State whether the duties of your office include the collection of taxes (delinquent or otherwise) or the custody of public moneys of the county, district or any political body? Yes.

10a. If the bond is desired for a tax collector, give the exact or the approximate amount of the tax roll.

11. Have you any deputies? Yes. If so, how many? 2. Are they bonded by corporate or personal sureties, and in what amounts?

12. At what times are your official accounts subject to examination and by whom is the examination made. Yearly. State Auditor.

13. When and by whom were your accounts last examined, and were they found correct?

14. What is your present business? Deputy City Recorder.

15. Will you continue therein or receive an income from that or any other source besides your official compensation? No. Estimated total (including official) annual income, $3300.00.

124 16. (a) Do you own any real estate in your own name? No. If so, state following particulars:

Location	Description	Value	Encumbrances
.....	.....	.....	.....

(b) Please give description and approximate value of your personal property. None except household effects.

17. Have you ever been bankrupt or insolvent? No. Did you ever compromise your liabilities with creditors? No. Note. If discharged from, or still under liabilities incurred through being bankrupt or insolvent, or if either or both of the questions are answered 'Yes', state particulars in separate confidential letter to company.

18. Do you occasionally engage in purely speculative or hazardous transactions, such as stocks, grain, oil or real estate? No. Have you ever been in arrears or default in your present or any previous employemnt? No. Note: If either question is affirmatively answered, give particulars in separate letter to the company.

19. Give particulars and amount of

(a) Debts? none. (b) Judgments.....

(c) Liabilities from acting as endorser or security?

(d) Any other obligations not included in above?

20. Have you hitherto given security? If so, please give names and addresses of your bondsmen, and state why discontinued.

21. Do you now furnish security in addition to that herein applied for? If so, what kind, and to what extent?

22. Have you ever aplied to any other source for a bond? If so, state when and to whom, and whether successful. No.

To Avoid Delay in Issuance of Bond Answer Questions 23 and 25 Strictly In Accordance with the Requirements.

23. Please fill in the following blanks, giving dates of your employment and names of your employers during the past ten years, and showing places of residence even if not employed continuously during that period.

From What Date (Give Month and year)	To What Date (Give Month and year)	Employed as	At address	In Service of (Name of Employer or Corporation)
1.1.1909	12-31-1910	Clerk	Dooly Bldg.	Internat'l Smelt & Ref.
1.1.1911	2.1.1912	Deputy	C. & C. Bldg.	Salt Lake County
2.1.1912	10.31.1913	Agent	Salt Lake County	Salt Lake Speedway Co.

11.1.1913	12-31-1914	Deputy	Salt Lake County	Salt Lake County
1.1.1915	7.1.1917	"	"	"
7.1.1917	2.1.1918	"	"	"
2-1-1918	to date	"	"	Salt Lake City Corp.

Under

(Name of Manager, Superintendent or Head)
(of Department for Reference, with)
(present Post Office Address.)

Frank Kennedy, Butte, Mont.

Roscoe W. Vigus, Salt Lake

Dr. Fred Stauffer
Salt Lake City

Fred C. Bassett
Salt Lake City

Raymond C. Naylor—Calistoga

W. W. Barton—S. L. City.

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125 24. If your life is insured, state for what amount, for whose benefit, kind of policy, and in what Company.
Yes. $5000. Wife, 20 year pay Mutual Life.

25. Please give particulars respecting parents and nearest relatives, as follows:

Name of Father Wm. Groesbeck. Business. Dead. Address.....
" " Mother Eleanor C. Groesbeck, Address 158—1st Ave..

a. Names and addresses of brothers and sisters.

W. Groesbeck—Los Angeles, Calif.
Mrs. H. R. Eldredge, Cardston Alberta, Canada
Mrs. T. A. Clawson—158—1st Ave. Salt Lake City.

b. Nearest relatives and addresses, for reference if desired.

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26. Please give below the names and addresses of persons, not less than six (preferably eight, because all may not reply to inquiries), of intelligence and good standing,

householders where possible, for Referees, who have had a personal acquaintance with you, and who are not related to you, In no case, however, should a person be named who is a partner, or one of the firm, or an officer of the employer in whose favor the bond herein applied for is to be made.

Name	Occupation	Post Office Address If in a City, give definite location.
1. W. Mont Ferry		Salt Lake City
2. Roscoe W. Vigus		"
3. Fred C. Bassett		"
4. Dr. Fred Stauffer		"
5. R. W. Young		"
6. W. W. Barton		"
7. W. A. Leatham		"
8.		

In Consideration of the American Surety Company of New York acting as surety on the bond herein applied for, I hereby agree to pay to said Company, at its office in the City of New York, or to an authorized local agent, in advance, in each and every year, the premium charge of ..... dollars, unless said premium is reduced by the surety, until I serve upon said Company at said office competent written legal evidence of its discharge from its said suretyship and all liability by reason thereof.

It is agreed that the terms of agreement herein shall be binding upon the applicant in the event of his subsequently holding the said office, and his acceptance, express or implied, from the surety of its surety ship covering him therein, subject, however, to amendments of premium rate to conform to the surety's published schedule rate for such suretyship at the time of any such acceptance, which latter rate the applicant hereby agrees to pay.

That the acceptance by the Surety Company of this agreement or of additional security or of premiums or other compensation for its suretyship shall not in any way abridge, defer or limit its rights, privileges or immunites as surety which it might otherwise have or create against it any liability which would not otherwise exist.

The undersigned further binds himself, his heirs, executors, administrators and assigns to indemnify and keep indemnified the Surety from and against any liability, loss,

costs, charges, suits, damages, counsel fees and expenses of whatever nature, which the Surety shall or may for any cause, at any time, sustain or be put to in consequence of the Surety having executed said bond, or any renewal, continuation, extension or modification thereof.

I do also agree that said Surety Company may decline to become surety for me upon the bond hereinbefore applied for, or any other bond or obligation, and that it may cancel or withdraw from such bond, executed, or any other
126 bond or obligation it may execute for me, or any renewal or continuation thereof; and I do also expressly relieve said Surety Company and all others from disclosing or furnishing any information it may have obtained concerning me or my affairs, and do also relieve said Surety Company from any compliance with any provisions of any laws concerning the disclosure of any knowledge or information which may have been obtained concerning me or my affairs, and do release and discharge said Surety Company, and every person, association, firm or corporation furnishing it with any information concerning me or my affairs from any and all liability or responsibility under or by reason of any of the provisions of any of said laws, and from any and all claims, demands, causes of action and damages that may have, or purport to have, arisen by reason of any such laws, or any amendments thereof, or supplements thereto.

Signed and sealed.....19.....

Signed, sealed and delivered in the presence of:

.....

..... (Seal)

Applicant sign here EDWARD J. GROESBECK (Seal)"

Direct Examination of Mr. McKell Continued

By Mr. Jensen:

Q. Now, Mr. McKell, will you state to the court whether or not Mr. Groesbeck has paid anything to you on account of the moneys you paid to Salt Lake County as the surety on his official bond?—paid to the American Surety Company any moneys on account of the payment of $223,000 odd dollars which you made to Salt Lake County as a result of the failure of the bank as his official surety?

Mr. Moreton: Objected to as incompetent, immaterial, not within the issues.

A. Mr. Groesbeck has made no payment to the American Surety Company.

The Court: The objection may be overruled.

Mr. Moreton: Save an exception.

Q. So the only moneys you have received are the moneys which you have already testified to as having been paid by Walker Brothers Bank as a result of the two 10 per cent dividends and the balance of the previous dividend amounting to nine thousand odd dollars?

A. And the interest referred to, yes, sir.

Q. And if the Receiver in this case only pays an additional 15 per cent that will not be ample, will it Mr. McKell, to pay the balance of $125,666.00 still due?

127 A. No.

Mr. Moreton: May I have my objection before the answer that it is immaterial, not within the issues?

The Court: The objection may be overruled.

Mr. Moreton: Note an exception.

Cross-Examination of Mr. McKell

By Mr. Moreton:

Q. In figuring the amount of interest on $200,000.00 at eight per cent from February 29, 1924, I figured up to this date. There was $122,762.25 deposited in Walker Brothers Bank by the Receiver, which consisted of $9,143.41, the balance of the third dividend of ten percent, and the fourth dividend of $56,809.42, a total of $65,952.83 deposited on November 8th with Walker Brothers Bank by the Receiver, and approximately six months later the fifth dividend in the sum of $56,809.42 was deposited with that bank. The full sum of $122,762.25, together with $3017.47 interest, is made available for the company at the bank and the first draft drawn by the company in the sum of $17,952.71 was presented yesterday, being drawn in favor of the Preferred Accident Insurance Company.

The money was deposited in that bank in two deposits, one in November, 1924, and the other six months later, in May, 1925. The years certificate on the one matured on the 8th day of November and the six months period on the other

one at the same time. The interest was computed upon those certificates up to that time amounting to $3017.47. The figure of $3017.47 is the interest on the two certificates due November 8, 1925.

Mr. Jensen: We simply stipulated in the prior case that Walkers pay the money to the American Surety Company in the event the decree was affirmed or according to whatever decree was rendered by the upper court, and then when the matter went to the Supreme Court of the United States on certiorari, when the writ was denied within the time required, before they would pay that Mr. Moreton authorized payment; they were unwilling to pay without a statement from him.

Mr. Moreton: I have a copy of that statement, I will be glad to present. The only reason I want to offer this
128 paper I delivered to Walker Brothers Bank was for the reason it has been stated it was a consent; it may be argued that that too is res adjudicata.

The Court: Bring it along with you after adjournment.

The money was deposited in the form of a certificate deposit under an escrow agreement. The bank wanted some evidence before it released it. As soon as the amount was known and it was subject to the order of the American Surety Company, I wired the amount that was available. I felt that we were entitled to the money on November 8th. I understood what the decision of the Circuit Court was. As far as I was personally concerned, the bank had control of the money under the escrow agreement. After November 8th, the question of interest did not enter into the matter of the money being withdrawn by our company. Exhibit 8 is the original official bond executed by the American Surety Company for E. J. Groesbeck in the sum of $200,000.00, which he executed at the time he qualified for office.

(Exhibit 8 was offered and received in evidence and is in words and figures as follows:)

"American Surety Company
of New York
Capital $5,000,000.

Official Bond—Utah

Company's Home Office Building
100 Broadway, New York.

Know All Men By These Presents, That we Edward J. Groesbeck of Salt Lake City, Utah, as principal, and the

American Surety Company of New York, a corporation of the State of New York, duly authorized to do a surety business in the State of Utah, as surety, are held and firmly bound unto Salt Lake County, State of Utah.... in the penal sum of Two Hundred Thousand ($200,000.) Dollars, lawful money of the United States, for the use of whomsoever it may concern for which sum well and truly to be paid, the said principal hereby binds himself, his heirs, executors, administrators and assigns, and the said surety binds itself, and successors, jointly and severally, firmly by these presents.

In Witness Whereof, the said principal hereunto sets his hand and the said surety has caused these presents to be signed this 15th day of December 1920.

The Condition Of This Obligation Is Such, that whereas, the above bounden principal has been duly elected to the office of County Treasurer in and for Salt Lake County for a term beginning January 3rd, 1921.

Now, therefore, if the said Edward J. Groesbeck shall well, truly and faithfully perform all official duties now required of him by law and also such additional duties as may be imposed on him by any law of the State, subsequently enacted,
and if he shall account for and pay over and deliver to
129 the person or officer entitled to receive the same, all
moneys or other property that may come into his hands as such County Treasurer, then this obligation to be null and void and of no effect; otherwise to be and remain in full force and virtue.

(Signed) EDWARD J. GROESBECK

AMERICAN SURETY COMPANY
OF NEW YORK,
By (Signed) J. C. Smith,
Resident Vice-President.

Witness:
K. D. Hurdy (Signed)

(Seal of
American Surety
Company of New
York.)

Attest:
(Signed) H. Bay
Resident Assistant Secretary.

Statutory Affidavit for Corporate Surety—Utah.

State of Utah,
County of Salt Lake—ss.

Personally appeared before me, a Notary Public in and for [the] Salt Lake County, State of Utah, J. C. Smith, who being first duly sworn on oath deposes and says that he is Resident Vice-President of the American Surety Company of New York, a corporation organized under the laws of the State of New York, and that he is duly authorized to execute and deliver the foregoing obligation; that the said American Surety Company of New York is authorized to execute the same and has complied with all the laws of the State of Utah in reference to becoming sole surety upon bonds, undertakings and obligations. Affiant further says that William E. McKell, whose address is Salt Lake City, Utah, has been appointed as Attorney upon whom process for the State of Utah may be served according to law.

(Signed) J. C. SMITH

Subscribed and sworn to before me this 15th day of December, 1920.

(Seal) L. E. BEUSCHELL,
Notary Public.

My Commission expires''

Cross-Examination of Mr. McKell continued

By Mr. Moreton:

I stated in my former action that I checked up the security that was held by Mr. Groesbeck from the National City Bank, for the safe-keeping of the public funds deposited in the bank. I checked this up in the December previous to the failure of the bank. In the previous case I stated I had made inquiry regarding the security and Mr. Pingree had advised me relative thereto. That is the policy of surety companies generally and my company followed that practice in this instance, when I undertook to check up the depository protection taken and held by Mr. Groesbeck from the National City Bank in December prior to the failure of the bank. It was to our interests to do so. At the time
130 of the failure of the National City Bank, Mr. Groesbeck had as security for the safe-keeping of public funds deposited in the bank, a depository surety bond of the

National Surety Company in the sum of $125,000.00, a depository bond of the Massachusetts Bonding & Insurance Company in the sum of $25,000.00, and the bond of the Fidelity & Deposit Company in the sum of $75,000.00, aggregating in all $225,000.00 in corporate surety bonds for the safe-keeping of the public funds. In addition to these corporate surety bonds just mentioned, the National City Bank had pledged and delivered to Mr. Groesbeck, for the safe-keeping of those public funds so deposited, $360,000.00 in par value of the Crystal Lake Farm Company bonds. These bonds are held under an option agreement. The Halloran-Judge Trust Company has the physical possession of them. My Company does not nor does Mr. Groesbeck. At the trial of the other action I stated that in checking up these securities I was interested in seeing there was sufficient depository protection.

Mr. Jensen: Out of Exhibit 3 I offer in evidence the eighth Assignment of Error of the appellant National Surety Company on its appeal to the Circuit Court of Appeals from the decree of this Court, which appears at page 126 of Exhibit 3 and extends down to approximately the middle of page 128.

Mr. Morteon: We make no objection on the score it is a copy, but object to it as immaterial and irrevelant and not within the issues of this case.

The Court: Let the objection be overruled.

Mr. Moreton: Save an exception.

(Said eighth Assignment of Error from Exhibit 3 offered and received in evidence, is as follows:)

"The trial Court erred in failing to order, adjudge and decree that the claim of the National Surety Company against the said defendant Receiver in the sum of $125,000.00 and interest from June 5, 1922 at the rate of eight per cent per annum should be allowed and approved and that the defendant Receiver be ordered to pay to said National Surety Company the sum of $9,143.41 of the dividend now declared together with such further dividends as may be declared by him upon said deposit and that said National Surety Company is subrogated to and entitled to succeed to the rights of said Edward J. Groesbeck as Treasurer of Salt Lake
County and of Salt Lake County to all dividends that
131 may become payable on the claim of said Salt Lake
County and said Edward J. Groesbeck its Treasurer,

against said Receiver in the sum of $568,094.29, and that said National Surety Company is subrogated to and entitled to succeed to the rights of said Salt Lake County and said Groesbeck, its Treasurer, in the bonds of the Crystal Lake Farm Lands Company of the par value of $360,000.00 held by said Groesbeck as collateral security for the deposit of said moneys in said National City Bank until said National Surety Company shall have received on account of said dividends and/or the proceeds of said bonds the total sum of $125,000.00 together with interest thereon at the rate of eight per cent per annum from June 5, 1922, and that said National Surety Company is entitled to sell or otherwise dispose of said bonds and to apply the proceeds thereof toward the repayment of its claim as aforesaid, and that the said American Surety Company is not entitled to receive or participate in any of said dividends or said Crystal Lake Farm Lands Company's bonds of the par value of $360,000.00, or of the proceeds thereof, until the said claim of the National Surety Company is paid in full, for the reason that it appears by the evidence in said action and particularly by the depository bond furnished by said defendant National Surety Company to the plaintiffs E. J. Groesbeck as County Treasurer and to Salt Lake County, in behalf of said National City Bank and from the application for said bond executed by said bank, and by the undisputed testimony, that said National Surety Company has paid to said E. J. Groesbeck as County Treasurer, and to Salt Lake County the full penalty of its said bond in the sum of $125,000.00 and that said National Surety Company by reason thereof and by reason of its payment of said sum as aforesaid and by operation of law, and in justice, equity and good conscience, became and is entitled to be subrogated to the amount of such payment to all the rights and claims of Salt Lake County and E. J. Groesbeck, its Treasurer, against said National City Bank and said Edward E. Jenkins as its Receiver and that such claim is superior to any claim on the part of said American Surety Company, a corporation, and for the further reason that the undisputed evidence shows said National Surety Company has a valid claim for reimbursement from the Receiver of said Bank as provided for in said application made by said Bank for said Bond, in which application said National City Bank promised to indemnify and hold said National Surety Company harmless from any loss on account of its execution of said bond for said Bank, and that if said American Surety Company has any such right or claim upon the assets or funds in the hands of said Receiver, it is subsequent and inferior to

the rights of this defendant National Surety Company and must be postponed until such time as said National Surety Company has been made whole by reason of its said payment of $125,000.00 together with interest at the rate of eight per cent per annum from the date of its payment of the same on June 5, 1922. That the undisputed evidence shows that the right of subrogation of said American Surety Company, if any, is against the principal upon the bond executed by it, to-wit: E. J. Groesbeck, and that it is not entitled to either subrogation or reimbursement as against the said National City Bank or its Receiver; and that the legal right of the National Surety Company to reimbursement from said Bank and the Receiver thereof by reason of said application executed by said Bank and to the equitable right of direct subrogation against the said Bank and its Receiver, as the principal upon said bonds, is superior to any alleged right of said American Surety Company against said bank or its Receiver and the funds in his hands as such Receiver. That the undisputed evidence shows that E. J. Groesbeck, the principal on said official bond, executed by said American Surety Company, failed to comply with the provisions of Section 4500, Compiled Laws of Utah, 1917 by not taking full and complete depository protecton to cover the funds of Salt Lake County in said National City Bank and that had he done so the American Surety Company would have suffered no loss, and therefore, it should not be allowed to take advantage of the wrong of its principal to the injury of this defendant."

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132 Mr. Jensen: I suppose we can stipulate that Exhibit 10 is a true copy of the briefs filed by the National Surety Company in the Circuit Court of appeals in the other case, and Exhibit 9 is a true copy of the reply briefs of the National Surety Company in the appeal to the Circuit Court of Appeals.

Mr. Moreton: That is the fact.

Mr. Jensen: I desire to offer the following portion of Exhibit 10; beginning at page 4, commencing with the words "That said depository bond so executed by defendant," and ending on page 5, "Total $225,000.00"

Mr. Moreton: We object to the offer on the ground that it is immaterial, irrelevant and not a matter of defense in this case, which is one at law based upon an Indemnity Agreement, and for the further reason it is not fair to pick out a portion of this argument and offer that portion only.

The Court: That is the reason I am going to let the whole book in. You can refer to any that you want to, but he is designating now that upon which he relies, so as not to encumber the record, unless you think it is necessary to print the whole thing.

Mr. Moreton: I may want to offer the whole, inasmuch as part is offered and received on the theory that there may be parts that I may want to pick out and make a part of the record.

The Court: I will receive the whole book. We will consider all of the document in. You are at liberty to refer to any other portion that you want to.

Mr. Moreton: May I have an exception?

The Court: Yes.

(The portion of Exhibit 10 designated and offered by counsel as above, is as follows:)

"That said depository bond so executed by the defendant and appellant National Surety Company in behalf of said National City Bank in the sum of $125,000.00 was executed by it on or about the 3rd day of January, 1921, pursuant to a written application made therefore by said National City Bank, paragraphs three and eight of which application are as follows:

'3. That the Depository will, at all times, indemnify and keep indemnified the Company and save it
133 harmless from and against all claims, demands, liabilities, costs, charges, and expenses of every kind and nature which it shall at any time sustain or incur, and as well from or against all orders, judgments and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost, charge, expense, suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.' (Tr. 87)

'8. That the acceptance of this agreement and of the Depository's agreement to pay premiums for the execution of said Bond, or the acceptance at any time by the Company of other securities, shall not in any way abridge or limit the right of the Company to be subrogated to any right or rem-

edy or limit any right or remedy which the Company might otherwise have, acquire, exercise or enforce, and the Company shall have every right and remedy which the individual surety acting without compensation would have.' (Tr. 88).

That upon the failure of said National City Bank, the said surety company furnishing said depository bonds, paid to Salt Lake County and E. J. Groesbeck, its Treasurer, the full penalty of each of their respective bonds, as follows, to-wit:

National Surety Company	$125,000.00
Massachusetts Bonding & Ins. Company	25,000.00
Fidelity & Deposit Company	75,000.00
Total	$225,000.00

Mr. Jensen: I desire to particularly offer that part of Exhibit 10, commencing on page 11, with the words, "The said National Surety Company," and ending about the middle of that page, " said amount arising out of said bond to said defendant Receiver."

(Said portion of Exhibit 10, so designated and offered by counsel, is as follows:)

"The said National Surety Company, in its said Answer and Interpleader, further alleged that by reason of its said payment to Salt Lake County of the said sum of $125,000.00 and by operation of law, and in justice, equity and good conscience, it is entitled to subrogation in said amount as against the Receiver and its principal, the said National City Bank; and that the American Surety Company is entitled to subrogation only as against its principal, the said E. J. Groesbeck; and further alleges that the said National City Bank, in its written application to the said National Surety Company for said depository bond in the sum of $125,000.00, and as consideration for the issuance of said bond, promised and agreed to hold the said National Surety Company harmless and to indemnify and reimburse it for any loss which it might sustain by reason of its execution of said bond, and that following its payment to Salt Lake County of the penalty of said bond in the sum of $125,000.00, the National Surety Company duly presented its claim in said amount arising out of said bond to said defendant Receiver."

Mr. Jensen: On page 15, beginning with the first line "For the reason," and ending with the phrase, "and the funds in his hands as such Receiver"—that is the seventh line from the bottom—practically the entire page.

(The portion of Exhibit 10 so designated and offered by counsel, is as follows:)

134 "For the reason that it appears by the evidence in said action and particularly by the depository bond furnished by said defendant National Surety Company to the plaintiff E. J. Groesbeck as County Treasurer and to Salt Lake County, in behalf of said National City Bank and from the application for said bond executed by said Bank, and by the undisputed testimony, that said National Surety Company has paid to E. J. Groesbeck as County Treasurer and to Salt Lake County the full penalty of its said bond in the sum of $125,000.00; and that said National Surety Company, by reason thereof and by reason of its payment of said sum as aforesaid and by operation of law, and in justice, equity and good conscience, became and is entitled to be subrogated to the amount of such payment to all the rights and claims of Salt Lake County and E. J. Groesbeck, its Treasurer, against said National City Bank and said Edward E. Jenkins as its Receiver and that such claim is superior to any claim on the part of said American Surety Company, a corporation, and for the further reason that the undisputed evidence shows said National Surety Company has a valid claim for reimbursement from the Receiver of said Bank as provided for in said application made by said Bank for said bond, in which application said National City Bank promised to indemnify and hold said National Surety Company harmless from any loss on account of its execution of said bond for said Bank, and that if said American Surety Company has any such right or claim upon the assets or funds in the hands of said Receiver, it is subsequent and inferior to the rights of this defendant National Surety Company and must be postponed until such time as said National Surety Company has been made whole by reason of its payment of $125,000, together with interest at the rate of eight per cent per annum from the date of its payment of the same on June 5, 1922. That the undisputed evidence shows that the right of subrogation of said America Surety Company, if any, is against the principal upon the bond executed by it, to-wit, E. J. Groesbeck, and that it is not entitled to either subrogation or reimbursement as against the said National City Bank or its Receiver, and that

the legal right of the National Surety Company to reimbursement from said Bank and the Receiver thereof by reason of said application executed by said Bank and to the equitable right of direct subrogation against the said Bank and its Receiver, as the principal upon said bond is superior to any alleged right of said American Surety Company against said Bank or its Receiver, and the funds in his hands as such Receiver."

Mr. Jensen: Then, commencing on page 18, with the word "Argument," and continuing from there over to the middle of page 21, ending with the words, "In any event, it must be apparent that our legal right is superior to any purely equitable claim of subrogation asserted by the American Surety Company."

(The portion of Exhibit 10 so designated and offered by counsel, is as follows:)

"Argument.

The Legal Right of This Appellant Against Said Bank, Arising Out of Contract.

In response to the request of the defendant Receiver of said National City Bank, the trial court made its order herein requiring the appellant National Surety Company and American Indemnity Company to set forth their respective rights to the funds in the hands of the Receiver and those to hereafter accrue in his hands. Accordingly, each of the appellants filed their separate answers herein to said order of interpleader and in paragraph 12 of each of said respective answers (Tr. pp. 18, 27) it is alleged:

135 'That the said National City Bank in its written application to this defendant for said depository bond in the sum of $125,000.00, and as a consideration for the issuance of said bond, promised and agreed to hold the said National Surety Company harmless, and to indemnify and reimburse it for any loss which it might sustain by reason of its execution of said bond and following its payment to Salt Lake County of the penalty of said bond in the sum of $125,000.00, the National Surety Company duly presented its claim in said amount arising out of said bond to said defendant receiver.' (Tr. 18-19, 29).

In its answer, this appellant National Surety Company further alleged among other things, the facts with reference to its payment of the penalty of its said bond, the failure of

Treasurer Groesbeck to require said Bank to finish full and complete depository protection for the public funds, as required by law, the terms and conditions of the bond of the American Surety Company, and other facts relative to the right of this appellant to subrogation. The answer of the appellant concludes with a prayer that its claim against said defendant receiver arising out of the contract of said National City Bank to indemnify and hold it harmless and to reimburse it for any loss on account of its execution of said bond, be allowed and approved, and the defendant receiver ordered to pay this appellant dividends thereon. This appellant further prayed that it be given such other and further relief as to the court might seem just and equitable.

The claim of the National Surety Company to priority in the distribution of the dividends in the hands of and to be hereafter paid by the Receiver of said Bank, is therefore based upon two theories, first, its legal right of the reimbursement and second, its equitable right to subrogation. However, we wish to say at the outset of this argument, and most emphatically, that we rely foremost and primarily upon our legal right of reimbursement, based upon the rights acquired and reserved by this appellant and given to it by said Bank as the inducement and consideration for its execution of said bond.

Said agreement was offered by appellant and received in evidence and is in part as follows:

'Whereas, the company has executed, or is about to execute, for the Depository, the bond described in the foregoing application, which application is hereby referred to and made a part of this agreement:

'Now, Therefore, in consequence of the execution of said bond and the sum of One Dollar paid to the Depository by the Company, the Depository covenants and agrees with the Company, as follows:* * *

'3. That the Depository will, at all times, indemnify and keep indemnified the Company and save it harmless from and against all claims, demands, liabilities, costs, charges, and expense of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments, and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company, its successors and

assigns, all sums and amounts of money to meet every claim demand, liability, cost, charge, expense, suit, judgment, or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.

'4. That the Depository will immediately notify the company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or the commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge, by reason of the execution of said bond. * * *

'7. That the Company shall have the right to look to and rely upon the property of the Depository and its income and earnings, and to follow and recover out of the Depository's property, now belonging to it, or which may hereafter belong to it, and the income and earnings thereof; for anything due or to become due the Company under this agreement, the execution of the said Bond by the Company being for the Depository's special benefit and protection of the Depostiory's property, its income and earnings.

136 '8. That the acceptance of this agreement, and of the Depository's agreement to pay premiums for the execution of said Bond, or the acceptance at any time by the Company of other securities, shall not in any way abridge or limit the right of the Company to be subrogated to any right or remedy or limit any right or remedy which the Company might otherwise have, acquire, exercise or enforce, and the Company shall have every right and remedy which the individual surety acting without compensation would have.' (Tr. p. 87.)

The claim of this appellant arising out of said contract with said bank should have been allowed and approved by the trial court, and the Receiver directed to pay to it dividends thereon (Assignment of Error No. 8, Tr. p. 126).

In the case of United States Fidelity and Guaranty Company vs. Carnegie Trust Company, 164 N. Y. Supp. 92, it was held that where a trust company gave its indemnity agreement, covenanting to make good to a surety company which executed a bond for it, any moneys which that surety should be compelled to pay under the bond, the surety company became creditor of the trust company to the extent of the required payment and that the surety company had a right to have its claim allowed, approved and paid by the Superin-

tendent of Banks in charge of said defunct Carnegie Trust Company.

Paragraphs 7 and 8 of the indemnity agreement of this appellant are identical with the indemnity agreement considered in the case last mentioned above and reserve the right to this appellant to look to and rely upon the property of the depository and its income and earnings and to follow and recover out of its property for anything due or to become due to the appellant under said agreement, and further provided that the acceptance of said agreement 'shall not in any way abridge or limit the right of the Company to be subrogated to any right or remedy or limit any right or remedy the Company might otherwise have.' (Tr. p. 88) Therefore, by the specific terms of said contract executed by said Bank, this appellant acquired the right to look to the property of the Bank and to follow and recover the same in the hands of said defendant receiver of said bank. The appellant National Surety Company has thus become a creditor of the National City Bank, and its right to payment of dividends thereon, cannot be impaired by any claim of the American Surety Company. To hold otherwise would impair the contractual rights of this appellant and render the indemnity agreement of this appellant nugatory.

We fail to see how there can be any question of our legal right to recover from said receiver, based upon said contract of indemnity. At the time of the failure of the bank, this claim was a valid and outstanding obligation against the bank upon which a claim may be properly asserted against the Receiver, just as on any other debt of the bank. Such a claim would be proveable in bankruptcy or against an estate, and why not against the Receiver of this Bank? However, it may be said that this appellant, independent of its indemnity agreement, has the right of subrogation. That may be true, but at the same time such right of subrogation cannot detract from our legal rights.

The trial Court apparently ignored our legal rights against said bank, arising out of said contract of indemnity and evidently based its decision solely upon what it thought the equities of the parties were. It therefore becomes necessary for us to discuss the equitable rights of the parties, but in so doing, we do not wish to be understood as agreeing that this case should be decided solely upon the equities of the parties, even though we are decidedly of the opinion that the

equities of this appellant are superior as we shall hereafter point out. In any event, it must be apparent that our legal right is superior to any purely equitable claim of subrogation asserted by the American Surety Company."

Mr. Jensen: On page 44, the third paragraph there, beginning with the words "The decree complained of" and ending with the words "of this appellant."

137 (The portion of Exhibit 10 so designated and offered by counsel, is as follows:)

"The decree complained of herein operates to defeat the legal rights of this appellant against its principal, the said Bank, as well as to work an injustice to the superior equities of this appellant. But assume that the equities of this appellant and the American Surety Company are but equal, it still follows that subrogation to the American Surety Company will not be permitted to work an injustice to the equities of this appellant."

Mr. Jensen: Page 51, the last paragraph on that page.

(The portion of Exhibit 10 so designated and offered by counsel is as follows:)

"It is therefore most respectfully submitted, that the decree of the trial court herein be reversed, and that a decree be entered herein that the claim of the National Surety Company against said Receiver in the sum of $120,000.00, and the claim of the American Indemnity Company against said Receiver in the sum of $5,000.00, be allowed and approved, that the Receiver of said National City Bank be directed to pay to each of said appellants dividends on their respective claims, that the American Surety Company is not entitled to receive any dividends now in the hands of said Receiver or to hereafter accrue in his hands, until these appellants have been first reimbursed in full, that these appellants be authorized to sell said Crystal Lake Farm Lands Company bonds and to apply the proceeds thereof toward the repayment of their respective claims aforesaid, and that the claim of the American Surety Company herein be postponed until the said appellants and each of them are first repaid in full from funds accumulating in the hands of said Receiver, and/or proceeds from the sale of said Crystal Lake Farm Lands

Company bonds, and that the Court make such other and further order herein as may be just and equitable.

ARTHUR E. MORETON,
Attorney for Appellants National Surety Company and American Indemnity Company."

Mr. Jensen: From Exhibit 9 I particularly invite attention to page 11, beginning with the large cap sentence, "Indemnity Agreement of the Bank to The National," and continuing over to subdivision 2 on page 12.

(The portion of Exhibit 9 so designted and offered by counsel, is as follows:)

"Indemnity Agreement of the Bank of the National.

1.

In its discussion of this subject the American says that the National has no legal right on account of its indemnity agreement from the bank to take any of the dividends 'payable on the Treasurer's claim.' It argues that the American and the Treasurer had no knowledge of any such agreement. In reply, we say that they knew that the National was a surety only for the bank and had a right, irrespective of any indemnity agreement, to look to its principal, the bank, for reimbursement. But can the American claim that the National had any knowledge of its indemnity agreement with the Treasurer and upon which it so strongly relies to defeat the rights of the National? The whole argument of the
138 American under this heading is based upon the assumption that the deposit of Groesbeck was the Treasurer's personally, and that he is entitled to all dividends paid by the receiver. The County could not have received dividends upon that portion of the deposit represented by the repayment to it of the $125,000.00 by the National Surety Company, and the American can therefore acquire by its assignment from the County no such right. The indemnity agreement taken by the National from the bank was taken for the protection of the former, particularly in the event that the bank failed. Its failure does not destroy the rights of the National to follow and recover its loss from the assets of the bank, which right was expressly reserved to the National in the said Indemnity agreement. Throughout its discussion upon this point, the American assumes that the Treasurer

and not the County was the depositor and that it would be unfair to the depositor to permit the National to receive dividends either to his exclusion or pro tanto. However, it was the County and not the Treasurer who was the depositor and the County has now been paid in full. Surely neither the bank nor the National assumed two obligations when the bank received this deposit one to Salt Lake County and another and separate obligation to the Treasurer.

It would follow from the argument made by the American that if the Treasurer chose not to enforce the depository bond, it being his personal property, that the county could not step in and enforce the same; that as a matter of fact, it could not enforce it at all, but would have to stand by and look to his official bond in the sum of $200,000 for the repayment of its entire deposit. Such is not the law, nor was it the intent of the legislature when it passed the statutes relating to the treasurer's duties and obligations and Section 4500 relating to the deposit of public moneys.

The American argues that it undertook to protect the County but it did not undertake anything in connection with the bank or enter into any agreement except to act as surety for the Treasurer to the County. Such is not the case, for, as pointed out in our original brief, the American promised and agreed that the Treasurer would faithfully perform all official duties required of him, among which was his duty to comply with Section 4500 and thereby fully protect the public funds. Furthermore, the Supreme Court of Utah in the case of Salt Lake County vs. American Surety Company, 222 Pac. 600, which was the action based upon its bond here in question, held that the American Surety Company was liable for the loss of the public funds occasioned by the failure of the bank."

Mr. Jensen: Commencing on page 33, with the Number 4, near the bottom of the page, and continuing over to the top of page 34, ending with the phrase, "and direct cause of the loss to his surety."

(The portion of Exhibit 9 so designated by counsel and offered is as follows:)

"4. That by its payment of the penalty of its bond in the sum of $125,000.00 to Salt Lake County, the National Surety Company became subrogated to the rights of Salt Lake County against said Bank, and that its right of subrogation from Salt Lake County, together with its legal rights arisinig

from the indemnity agreement executed by the said Bank, are superior to any rights of the American Surety Company, and that the National Surety Company is entitled to be repaid in full before the surety of the Treasurer, whose failure to protect the public funds was the proximate and direct cause of the loss to his surety."

Mr. Jensen: If the Court please, out of an abundance of caution, I ask permission to offer from Exhibit 3, at page 89, the bond Exhibit 14. I am offering it as part of this record to show that it is the same bond that was offered in the other case.

The Court: It may be received.

139 (The portion of Exhibit 3 so designated and offered by counsel, is as follows:)

"Depository Bond.

Know All Men By These Presents: That The National City Bank of Salt Lake City, Salt Lake County, Utah, as Principal, and The National Surety Company, a corporation of the State of New York, as Surety, are held and firmly bound unto Edward J. Groesbeck, Treasurer of Salt Lake County, Utah, in the sum of One Hundred and Twenty-Five Thousand ($125,000.00) Dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Dated the Third day of January, A. D. 1921.

Whereas, The said principal The National City Bank of Salt Lake City, has applied for a part of the funds in the treasury of the County of Salt Lake, State of Utah, to be deposited in said bank, the amount whereof shall be subject to withdrawal or diminution by said treasurer as the requirements of said County of Salt Lake shall demand, and which amount may be increased or decreased as the said treasurer may determine; and

Whereas: the said Bank, in consideration of said deposit and for the privilege of keeping the same, has agreed to pay to the said County of Salt Lake, State of Utah, interest on such sum at a rate not less than two per cent per annum, on

the amount of said deposit, the same to be credited and paid monthly upon the daily average of such amount as the said bank shall have on deposit for the month, or any fraction thereof, next preceding the crediting or payment of said interest, which interest shall be computed and credited to the account of the Treasurer of Salt Lake County and shall become thenceforth a part of such deposit.

Now, Therefore, if the said The National City Bank of Salt Lake City shall, at the beginning of each and every month render to the said Edward J. Groesbeck, Treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Lake's money held by it during the month next preceding, and the interest thereon, and how the same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, Treasurer, as aforesaid, and shall pay over the same, and any part thereof, upon the check or written demand of the said Edward J. Groesbeck, Treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects, save and keep the said Edward J. Groesbeck, Treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue.

Provided, that, if the said Surety shall so elect, this bond may be cancelled at any time by giving thirty days notice in writing to the said Treasurer, and to the persons authorized by law to approve of such bonds, such notice to be accompanied by a sworn statement of all facts and setting forth the reasons in connection with such request for cancellation, and this bond shall be deemed cancelled at the expiration of said thirty days, and said Surety remaining liable for all or any acts covered by this bond which may have been committed by said The National City Bank of Salt Lake City, up to and including the date of expiration of said thirty days notice. The said surety shall, upon the surrender of this bond and its release from all liability thereunder upon request refund this premium paid, less a pro rata part thereof for the time this bond shall have been in force.

Signed and sealed, the day and year first above written.

THE NATIONAL CITY BANK
SALT LAKE CITY
By H. J. Wallace,
Vice President.

140 NATIONAL SURETY COMPANY,
By J. B. Moreton,
Its Attorney-in-fact."

Attest:
F. M. Pingree, Cashier.

Mr. Ray: If the court please, I would like to refer again to the defendants Exhibit 10, and to page 8 thereof, and call attention of the court to the fact that we rely upon the following language, beginning in the fifth line from the bottom of page 8: "Balance due County to pay it in full, and which amount was conceded to it by all parties, and has been paid to it out of dividends here in controversy, $47,666.01."

The Court: It may be received.

Mr. Moreton: Do I understand all of these records, the entire Transcript and two briefs that have been offered here, are in evidence?

The Court: I understand they are in the record, that is, they are available for you, but it is understood that they will not be transcribed by the stenographer or even printed in the record on appeal, except as you designate.

Mr. Moreton: Then I may point out any portion thereof on argument, or have any portion included in the record in any appeal that may be taken.

EDWARD J. GROESBECK, one of the defendants, was sworn and testified on direct examination as follows:

My name is Edward J. Groesbeck and I am now County Treasurer of Salt Lake County and have held that office since January 3, 1921. Out of the third dividend paid by the Receiver, I received under the decree of this Court, on behalf of Salt Lake County, the sum of $47,666.01. Since that time there has been paid checks which were issued in my name and which I have endorsed to Walker Brothers Bank on account of this deposit, in the sum of $9,143.41 and two ten

per cent dividends of $56,809.42 each. Other than that, I have received no money from the Receiver by way of dividends on my deposit in the National City Bank. That money has been deposited with Walker Brothers Bank
141 and I have not received any part of it. Outside of the application of those funds on the claim of the American Surety Company for the $223,000 it paid as my surety, nothing has been paid on its claim, so far as I know. I have not paid anything personally on its claim, so that the balance, except for that amount, of its claim is unpaid.

Cross-Examination of Mr. Groesbeck

By Mr. Moreton:

Exhibit 11 is the Receiver's Certificate that was issued on account of the deposit of Salt Lake County in the National City Bank and is in the amount of $568,094.29.

Mr. Morteon: We offer in evidence Exhibit 11.

The Court: It may be received.

Mr. Moreton: It is in printed form, a copy of which could be supplied except this portion written across the face of it in red ink, which is as follows:

"(a) This claim is secured by bonds of the Crystal Lake Farms Company of the par value of $360,000, delivered for that purpose to the said E. J. Groesbeck as such county treasurer by the National City Bank of Salt Lake City, Utah.

(B) Under depository bond guaranteeing to said E. J. Groesbeck as county treasurer of said Salt Lake County, Utah, deposits in the National City Bank of Salt Lake City, Utah, the Massachusetts Bonding and Insurance Company and the National Surety Company of New York claim to be subrogated to the rights of said E. J. Groesbeck as such County Treasurer in and to this claim as follows:

The first named company, to the extent and by reason of its payment on the 2nd day of June, 1922, to said E. J. Groesbeck as such County Treasurer of the sum of $25,000 under its depository bond No. D 16362. The last named company to the extent and by reason of its payment an the 10 day of June 1922 to said E. J. Groesbeck as such County Treasurer of the sum of $120,000 under its depository bond No. 3206907-C1 20466. Signed Edward E. Jenkins, Receiver."

(Exhibit 11 offered and received in evidence, except for the red ink notations across the face above copied into the record, is in words and figures as follows:)

"Important. Do not lose this certificate. It must be presented when each dividend is paid.

Pr.
THE NATIONAL CITY BANK LL.
OF SALT LAKE CITY, UTAH. LL.
Sch

Receiver's Certificate of Proof of Claim.

No. 1072 Salt Lake City, Utah, Sept. 3rd, 1923.

142 This is to certify, That E. J. Groesbeck County Treasurer has this day made legal and satisfactory proof that E. J. Groesbeck County Treasurer [—] creditor of the National City Bank of Salt Lake City, Utah, to the amount Five Hundred sixty eight thousand ninety-four dollars and twenty nine cents, upon the following claim, to-wit:

	Dollars Cents.
Balance due on open account, subject to check 873-4-5-6-7-8-9-30-1-2-3-4-5-6-	568,094.29
Balance due on Savings Account	
Certificate of Deposit No. .... issued by the National City Bank of Salt Lake City, Utah.	
Certificate of Deposit No. .... issued by the National City Bank of Salt Lake City, Utah.	
Interest on Certificate of deposit No. .... issued by the National City Bank of Salt Lake City, Utah.	
Interest on Certificate of deposit No. .... issued by the National City Bank of Salt Lake City, Utah.	
Unpaid draft No. .... issued by the National City Bank of Salt Lake City, Utah, on	
Protest fees on draft No. ..... issued by the National City Bank of Salt Lake City, Utah.	
Unremitted collection No.	
Total	568,094.29

and E. J. Groesbeck County Treasurer or the lawful assignee of this claim, will alone be entitled to the dividends thereon.

No assignment of this claim or any portion thereof, will be recognized in the payment of dividends, unless notice of such assignment is given to the receiver and entered upon his books before such dividends are declared, as evidenced by his endorsement hereon. This certificate is to be surrendered to the receiver upon the payment of final dividend.

EDWARD E. JENKINS,
Receiver of the National City Bank
of Salt Lake City, Utah.

(On the back thereof the following)

....., 192..

For value received ..... hereby assign the within claim to .....

Witness .....

Entered 192

....., Receiver.

A dividend of $56,809.42, being dividend #3, having accrued on account of the within claim and a dispute having arisen between E. J. Groesbeck, Treasurer, and certain bonding companies as to who should receive said dividend, said dividend was, by E. E. Jenkins, Receiver, paid into the United States District Court of the District of Utah, in the
143 case of Salt Lake County et al vs. E. E. Jenkins, Receiver, and said Court in said action having made and entered its order on May 28, 1924, directing that $47,666.01 of said $56,809.42 be paid forthwith to E. J. Groesbeck as Treasurer of Salt Lake County, the said Receiver has this day paid to said E. J Groesbeck as Treasurer the sum of $47,666.01 and caused said payment to be endorsed on the within certificate and said E. J. Groesbeck acknowledges receipt of said sum in full compliance with said order of said Court.

May 29, 1924.

EDWARD E. JENKINS, Receiver,
By Lawrence H. Heath.

Paid balance ($9,143.41) pursuant to stipulation Nov. 7, 1924.

EDWARD E. JENKINS, Receiver,
By Lawrence H. Heath.

Paid $56,809.42 under terms of stipulation of May 7th, 1925, to E. J. Groesbeck, Treasurer.

EDWARD E. JENKINS, Receiver,
By Lawrence H. Heath.

No. 1072
The National City Bank of Salt Lake City, Utah.
Receiver's certificate of proof of claim for $568,094.29.
Name E. J. Groesbeck, Co. Treasurer.

Dividends on within claim have been paid as follows:

First dividend, 20 per cent, paid Sept. 6, 1922. H. E. J.
Second dividend, 10 per cent paid Feb. 27, 1923, H.
Third Dividend, 10 per cent, paid May 29, 1924, H.
Fourth dividend, 10 per cent, paid Nov. 8, 1924, H.
Fifth dividend, 10 per cent, paid May 7, 1925, H.
Sixth dividend, .. per cent, paid
Seventh dividend, .. per cent, paid,
Eighth dividend, .. per cent, paid
Ninth dividend, .. per cent, paid
Tenth dividend, .. per cent, paid."

Cross-Examination of Mr. Groesbeck continued

By Mr. Moreton:

The National Surety Company paid to Salt Lake County on account of its bond that is herein sued on, the sum of $125,000.00. That amount does not appear to be credited on this Receiver's Certificate. At the time of the payment by the National Surety Company of the sum of $125,000.00 the penalty of its bond, I gave a letter to that surety company which is shown in defendants' Exhibit 3 at page 63.

(Said letter was offered and received in evidence and is as follows:)

"Salt Lake County,
Treasurer's Office,
E. J. Groesbeck, Treasurer.

Salt Lake City, Utah
June 5, 1922.

144 National Surety Company,
115 Broadway
New York City, N. Y.

Gentlemen:

In receiving your check for $125,000.00 in full payment and discharge of all liability, claim or demand under your certain bond in which the National City Bank of Salt Lake City, Utah, is principal, and you are surety, bearing date of January 3rd, 1921, in the sum of $125,000.00 in favor of the undersigned, conditioned for the payment of moneys deposited in said Bank, as in said bond provided, it is understood that the question of the extent of your subrogation to the rights of the undersigned and of Salt Lake County, is left open for future determination; it being my contention that your Company is not entitled to subrogation until and in the event I have been first reimbursed in full to the extent of my entire claim against the National City Bank, and I understand that it is your contention that your Company is entitled to subrogation pro tanto immediately upon payment to me of the above amount, regardless of whether or not I am first reimbursed in full.

Your payment is, therefore, made and received as aforesaid without prejudice to your rights or contention and the question of the extent of your subrogation is therefore left open for future determination.

Yours very truly,

E. J. GROESBECK
Treasurer Salt Lake County."

I wrote that letter to the National Surety Company at that time and delivered it to them.

(The Resolution of the Board of County Commissioners of Salt Lake County, passed at the time of the payment of the said sum of $125,000.00 by the National Surety Company, was received in evidence and is as follows:)

"Resolution.

Resolved that for and in consideration of the sum of $125,000.00 to Salt Lake County in hand paid by the National Surety Company of New York City, hereinafter called the surety, the receipt of which is hereby acknowledged, Salt Lake County does hereby release and discharge the said surety from all liability, claim or demand under its certain bond in which the National City Bank of Salt Lake City, Utah, is principal and it is surety, bearing date on or about January 3rd, 1921, in the penal sum of $125,000.00 in favor of E. J. Groesbeck, Treasurer of Salt Lake County, Utah, conditioned for the payment of moneys deposited in said bank as in said bond provided.

Be it further resolved that in accepting said payment as aforesaid, the question of the extent of subrogation of said National Surety Company to the rights of Salt Lake County is left open for future determination, and the said payment is received without prejudice to the claim of the said Surety Company to subrogation pro tanto to the rights of Salt Lake County against said National City Bank and its Receiver, as said claim is not thereby conceded by said County, said question being left for future determination."

At the time of the failure of the bank, there was on deposit some $643,014. and some odd cents. In drawing against that account, I was required by law and by the bank as well to secure the counter-signature of the County Auditor on
145 all checks drawn by me. As a matter of fact, I had occasion to draw few checks on this account, that is, comparatively few. All warrants drawn against this bank account in the payment of salaries to employees of Salt Lake County and for bills incurred by it, are drawn and signed by the County Auditor and not the Treasurer. In other words, the Auditor drew all checks and warrants against this account, except as it might be necessary to transfer to the state or other political subdivisions of the state, their portion of the tax money collected, and then in such event I drew the check but was obliged to have the counter-signature of the County Auditor. Therefore, all bills, County Bills and County expenses, were paid for by the Auditor drawing the warrants against this deposit.

The Court: I suppose that is the law, isn't it? The statute requires it?

Mr. Moreton: That is the law.

Redirect Examination of Mr. Groesbeck

By Mr. Jensen:

In this matter of handling County funds, that is, the checking of it out, the Auditor draws his warrant on me and I countersign it before it is payable at the bank. Without my counter-signature, the warrant of the Auditor would not be payable, and no money could be checked out of the National City Bank without my signature. As a matter of practice, I do not know of any check of the county or any warrant of the County Auditor being honored by the National City Bank against the deposit except it was countersigned by me.

The Court: Does the law require it to be done that way?

Mr. Jensen: That is my understanding of it.

Mr. Moreton: The law requires that every warrant drawn by the County Auditor shall be registered by the Treasurer, and for that purpose he countersigns as to whether or not there are funds available, but the law requires the auditor and he alone to draw against this account.

The Court: That is, he takes the initiative?

Mr. Moreton: Yes.

146 The check for $125,000.00 paid by the National Surety Company was made to me as County Treasurer. In order to make the County whole both as to principal and interest, I applied toward doing that the payment made by the National Surety Company of $125,000.00, the payment by the Massachusetts Bonding & Insurance Company of $25,000.00, and the payment made by the Fidelity & Deposit Company of $75,000.00, plus also the first dividend of twenty per cent, the second dividend of ten per cent, and then the $47,666.01 out of the third dividend, in accordance with the decree of the Court. It took the payments made by the three bonding companies above mentioned, the first dividend of twenty per cent, the second dividend of ten per cent, the $47,666.01 out of the third dividend, together with the $223,000 paid by the American Surety Company to make the county whole. It took all that money to pay up the county as to both principal and interest. The only money that has been available since to apply on the claim of the American in accordance with the decree of this Court, are the two dividends of ten per cent each and the $9,143.41 balance out of the third dividend.

Recross Examination of Mr. Groesbeck

By Mr. Moreton:

The check of the National Surety Company in the sum of $125,000.00 was not made to me personally but as Treasurer of Salt Lake County. I don't recall whether the National Surety Company required the endorsement of that check by Salt Lake County by its Auditor and Chairman of its Board before the check was paid.

Mr. Jensen: It is in evidence; it appears at page 98 of the transcript; we have already offered it.

Mr. Moreton: Counsel is in error about that. At page 98 of the abstract does appear a check to E. J. Groesbeck as treasurer of Salt Lake County, where it is recited "In
147 full payment of all liability of National Surety Company under its bond dated January 3, 1921, for $125,000.00 covering the funds of the county of Salt Lake, Utah, on deposit in the National City Bank, Salt Lake City, Utah; it being understood by this payment the said National Surety Company is subrogated to all of said county's right, title, interest and claim of, in to or upon the said deposit to the amount of the payment herein made, $125,000.00."

The Court: You say that is not the check?

Mr. Moreton: I don't want counsel to be misled in the matter. That is not the check.

The Court: Have you got it?

Mr. Moreton: No; it would be in the home office.

The Court: Off of the stand, he and you check up and see if you can refresh your recollection and get it straight. All we want to know is what the fact is. Did you get that check back, or your client?

Mr. Moreton: That check was issued by the home office of the company in New York; once having been paid it would be returned to the office in New York; I haven't it.

The Court: You will have to see if you can get together on your recollection. Anything further?

Mr. Moreton: I have nothing further with this witness.

Mr. Jensen: We rest, your Honor.

The Court: Do you rest?

Mr. Moreton: No, your Honor, there are some matters I would like to offer. Counsel for defendants have made a motion that the case be transferred to the equity side. At the outset of the case I made motions to strike certain portions of the answers of the defendants on the theory that they were immaterial and did not constitute a ground of defense to the complaint, upon my theory of the case, it being an action at law, and further, they have likewise offered testimony going into the equities of the case, to which testimony I have objected as counsel for the plaintiff. Now, then, the case
148 has in effect become one in equity, but in view of my theory of the case, I cannot well request your Honor to transfer it to the equity side, but in view of the fact of your Honor's rulings, I trust the Court will pardon me if I suggest that I think the Court should now, upon its own motion, transfer it to the equity side, subject, however, to our objections heretofore made, because it puts the plaintiff now in an embarrassing situation because equitable defenses have been admitted, which is contrary to our theory, of course, with due respect to the Court. So while I cannot now ask the Court to transfer it,it would be inconsistent—I think the Court should, in justice to the plaintiff, now made an order transferring it, subject to our objection.

The Court: When I finally get through and decide the case, the way I will decide it will indicate what I consider material. If I decide it on your theory, I will wholly disregard the equitable defenses; if I maintain the equitable theories, I will decide it as such and order it transferred, if necessary. I will make such formal order as is necessary to preserve the record. If I should make an order now it would be purely arbitrary, because I am not sufficiently advised as to the merits of these equitable issues to say whether they should recover or should not. Have you any rebuttal that you desire to offer?

Mr. Moreton: Yes, your Honor, Mr. Jenkins was going to give me some figures before they closed their case, or some further information.

The Court: I hope you will understand me with respect to siting as a Court of equity and a court of law. By stipulation I am sitting here as a court of law. By virtue of certain equitable issues raised in the pleadings, I am sitting as a court of equity; what I shall finally determine upon the decision of this case will determine whether there are in fact equitable issues really to be considered.

Mr. Moreton: I wouldn't want the Court to decide the case on equitable principles, then if I should be compelled to appeal, find the facts could not be reviewed because I had insisted it was a law case.

The Court: Wouldn't the result of the decision determine that question?

149 Mr. Moreton: I think so.

The Court: Then if necessary that any formal order should be made nunc pro tunc, I will do it.

The defendant EDWARD E. JENKINS was recalled by the plaintiff for further cross-examination and testified as follows:

By Mr. Moreton:

I stated on direct examination that there was a slight change in the amount of claims allowed by the Receiver since the time of the filing of my answer in this case. At the time I file my answer, I allege that in order to pay a ten per cent dividend it would require me to have on hand the sum of $158,382.03. The claims that had been allowed by me as Receiver against the bank at the time of the filing of my answer were of course ten times that figure. I think those figures were in error about $18.00. The actual figures of the claims approved taken from the dividend ledger, are $1,583,926.88. That amount in claims has been allowed so far. My clerk in making up his account for Mr. Ray apparently made a mistake when he gave the figures to him. The amount stated in the answer is $1,583,820.30 and the actual amount is $1,583,926.88, a difference of $105.85. It is a clerical error that has crept in. In that figure I do not include the claim of the National Surety Company in this action. The figures I have given are approved claims. I have with me the original copy of the claim presented by the National Surety Company and upon which this suit is founded. It is marked Exhibit 12 and was presented and filed with me on April 10, 1925. That claim has been in my possession and I now produce it in court at your request.

(Exhibit 12 was offered, received in evidence, and is in words and figures as follows:)

In the Matter of the Receivership of National City Bank of Salt Lake City.

Claim of National Surety Company.

150 State of New York,
County of New York—ss.

"H. J. Lofgren, being first duly sworn, deposes and says that he is an officer, to-wit, the Vice President of the National Surety Company, a corporation organized and existing under the laws of the State of New York with its principal place of business at New York City in said state; that as such officer he is its agent and that he is authorized to make this Proof of Claim.

That the claimant National Surety Company was, at all times herein mentioned and is now, engaged in the business of furnishing surety bonds, and during all such times has complied with the provision of the constitution and laws of the State of New York and Utah, so as to entitle it to do business in each of said states.

That the National City Bank is a national banking corporation organized and existing under and by virtue of the laws of the United States and particularly under the act of congress known as the "National Banking Act," and has its office and place of business in Salt Lake City, Utah.

That at all times herein mentioned, Edward J. Groesbeck was and now is, County Treasurer of Salt Lake County, State of Utah; that the laws of the State of Utah, to-wit, Section 4500, requires that the County Treasurer shall, before making a deposit in any bank, require from such depository collateral security or a good and sufficient surety company bond or a personal bond approved by him and sufficient in amount to fully protect such funds.

That while the said National City Bank was actively engaged in the business of conducting a national bank at Salt Lake City, Utah, and prior to the 3rd day of January, 1921, the said Edward J. Groesbeck, being then and there about to deposit funds in said National City Bank, required that the said Bank furnish to him, as a condition precedent to the depositing of the funds of said County in said Bank and as a guarantee of the repayment of the same, a depository bond in the sum of $125,000.00, under the statutory provision referred to.

That the said National City Bank applied to this claimant National Surety Company for such a surety bond, and that as an inducement and the consideration for the execution of said bond by this claimant, and prior to the delivery of the same, the National Surety Company demanded and received from said National City Bank its written indemnity agreement, in which it is provided in part as follows:

'That the Depository will, at all times, indemnify and keep indemnified the Company and save it harmless from and against all claims, demands, liabilities, costs, charges and expense of every kind and nature which it shall at any time sustain or incur and as well from or against all orders, judgments and adjudications whatever by reason or in consequence of having executed said Bond, and will pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money to meet every claim, demand, liability, cost, charge, expense suit, judgment or adjudication against it by reason of the execution of the Bond applied for and before the Company shall be required to pay thereunder.

'That the Depository will immediately notify the Company at its principal offices in the City of New York, of the making of any demand or the giving of any notice or the commencement of any suit or proceeding, or the fixing of any liability which the Company may be called upon to discharge, by reason of the execution of said Bond. * * *

'That the Company shall have the right to look to and rely upon the property of the Depository and its income and earnings, and to follow and recover out of the Depository's property now belonging to it, or which may hereafter belong to it, and the income and earnings thereof, for anything due or to become due the Company under this Agreement, the execution of the said Bond by the Company being for the Depository's special benefit and protection of the Depository's property, its income and earnings.'

151 That the said National Surety Company did thereafter, to-wit, on the 3rd day of January, 1921, make, execute and deliver to said Edward J. Groesbeck, as County Treasurer, and to Salt Lake County, its bond in the sum of $125,000.00, executed by the said National City Bank as principal and by the said Edward J. Groesbeck as such County Treasurer and funds were thereafter deposited by him in said National City Bank. That the said bond contained the following provision:

'Now, therefore, if the said The National City Bank of Salt Lake City, shall, at the beginning of each and every month, render to the said Edward J. Groesbeck, Treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Lake's money held by it during the month next preceding, and the interest thereon, and how the same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, Treasurer as aforesaid, and shall pay over the same, and any part thereof, upon the check or written demand of the said Edward J. Groesbeck, Treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects save and keep the said Edward J. Groesbeck, Treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue.'

That thereafter, the said Edward J. Groesbeck, as such County Treasurer, did make deposits in said National City Bank and at the time of the failure of said Bank on the 17th day of January, 1922, had on deposit in said Bank, of the funds of said Salt Lake County, $643,094.29. That following the closing of said Bank on said day, Edward E. Jenkins was appointed, qualified and acting Receiver of said Bank.

That following the failure of said Bank, the said Edward J. Groesbeck as County Treasurer, and Salt Lake County, made formal demand in writing upon this claimant to make immediate payment to it and to them of the said deposits up to the amount of said bond, to-wit, $125,000.00, and because of said demand and because of the breach of said bond by said National City Bank, this claimant was obliged to and did, on or about the 17th day of June, 1922, pay to said Edward J. Groesbeck and Salt Lake County the said sum of $125,000.00.

That heretofore and subsequent to aforesaid payment, the National Surety Company duly transferred and assigned to the American Indemnity Company, a corporation, of Galveston, Texas, $5000.00 of its said claim of $125,000.00 hereinbefore set forth. From the time of said assignment continously said National City Bank has been and still is indebted to said National Surety Company on account of the matters herein stated in the sum of $120,000.00. No further

or additional assignments or transfers of any portion of said claim has been made and this claimant is the sole and exclusive owner thereof to the extent of said $120,000.00.

That no part of said debt of said National City Bank to this claimant, arising out of said Indemnity agreement, or otherwise or at all, has been paid, that there as no set-offs or counter-claims to the same, and that no assignments have been made excepting as above set forth and that the full amount of said sum of $125,000.00 was, at the time of said payment by this claimant as aforesaid on to-wit, June 17, 1922, and resulting therefrom and from said indemnity agreement and said bond, justly due and owing from said National City Bank to this claimant National Surety Company, and there is now justly due and owing from said National City Bank to this claimant, National Surety Company, said balance in the sum of $120,000.00 and that no part thereof has been paid and that there are no set-offs or counter-claims to the same.

That the said National Surety Company demands that its claim, as above set forth, in the sum of $120,000.00, arising out of the express promise and agreement of said National City Bank to reimburse said National Surety Company and hold it harmless, be allowed and approved and that dividends, in the amount and upon the same basis as heretofore paid to other claimants in the list of common claims and also that all future dividends to be declared and made pay-
152 able to said common creditors, be paid to this claimant ratably with other creditors, upon said sum of $120,000.00.

(Signed) H. J. LOFGREN

NATIONAL SURETY COMPANY
A. C. H. By (Signed) H. J. Lofgren
Vice Prest.

Subscribed and sworn to before me this 31st day of March, 1925.

(Seal) (Signed) WM. M. WEAVER,
Notary Public.
Residing at New York City, N. Y.

My Commission expires:

WM. M. WEAVER
Notary Public for New York County, No. 260

Certificate filed in Kings, No. 98, Nassau, Queens, No. 19

Bronx No. 13, Richmond and Westchester counties

New York County Register's Office No. 6118

Kings County Register's Office No. 6067

Bronx County Register's Office No. 2643

My Commission expires March 30, 1926.

(Rec'd April 10/25)
EEJ Receiver)"

Cross-Examination of Mr. Jenkins continued

By Mr. Moreton:

The Fidelity & Deposit Company has a Receiver's Certificate in the sum of $75,000.00 similar in form to the one that Mr. Groesbeck has. They are drawing their dividends on that. Before I issued that certificate I received from the Fidelity & Deposit Company an assignment from Mr. Groesbeck of that portion of the deposit. The original of that assignment is marked Exhibit 13.

Mr. Jensen: Are you raising any question about the fact that the Fidelity & Deposit wasn't entitled to that under its bond?

Mr. Moreton: Not at all. You gentlemen will argue that it was by virtue of some other arrangement that this company received this money, whereas it is manifest, it shows on the face of it, it is by reason of subrogation.

Mr. Jensen: By reason of its own contract.

(Exhibit 13 was offered, received in evidence and is as follows:)

"Whereas, The Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland and authorized to do business in the State of Utah, did execute its depository bond in the sum of Seventy-five Thousand ($75,000.00) Dollars, in favor of E. J. Groesbeck, County Treasurer, securing the deposit of E. J. Groesbeck, County Treasurer of Salt Lake County,

Utah, and/or Salt Lake County, in the National City Bank of Salt Lake City, Utah; and

Whereas, E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, acting by and through the said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, had on deposit the sum of Six Hundred Forty-three Thousand, Ninety-four Dollars and Twenty-nine Cents ($643,094.29) in said Bank on the day and at the time it suspended payment, January 17, 1922;

153 Now, Therefore, E. J. Groesbeck, County Treasurer of Salt Lake County, and/or Salt Lake County, hereby acknowledge the receipt of the sum of Seventy-five Thousand ($75,000.00) Dollars paid to it by the said Fidelity & Deposit Company of Maryland and the said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, hereby subrogate and acknowledge that the said Fidelity & Deposit Company of Maryland is subrogated to the extent of a 7,500,000/64,309,429 share or portion in, to and of all the right, claim and demand of the said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, against the said National City Bank of Salt Lake City, Utah, and in and to the same proportionate share of any and all right to preferred payment out of and other preference right in or to, the assets of the said Bank which said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, may have as sovereign or otherwise, including any right or claim against said Bank, its successors and assigns, and against any receiver of said Bank or any State Bank Examiner in charge of said Bank in his official capacity and against each and every stockholder, officer and director of said Bank as its and their liability may at any time hereafter be established: and it is further the intent hereof that the said Fidelity & Deposit Company of Maryland, its successors and assigns, shall be entitled to collect and receive 7,500,000/64,309,429 of any dividend or payment upon the amount of the Bank balance standing to the credit of E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County in said Bank, and to demand, collect and receive the same proportion of any and all dividends which may be declared or become payable on account of the same or on account of the sum due to the said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, because of said deposit and to take all or any proper steps or proceedings to obtain payment of such proportionate share of said sum; and it is further the intent hereof that the said Fi-

delity & Deposit Company of Maryland is hereby subrogated proportionately with others as their rights may appear to the extent of Seventy-five Thousand ($75,000.00) Dollars to any right which E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County may have to share in any excess either of collateral held by the Treasurer to secure said county deposits or which may arise from the enforcement of a certain excess deposit bond dated on or about the 26th day of November, 1921, and signed by G. W. Lambourne, F. M. Pingree, J. Wm. Knight, and seven others, and said Company reserves the right to share in such excess.

The said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, do hereby warrant that it had on deposit to its credit with the said National City Bank at the close of business on the 17th day of January, 1922, the sum of Six Hundred Forty-three Thousand, Ninety-four Dollars and Twenty-nine Cents ($643,094.29) and that no part of said deposit has been withdrawn since said last named date, and that said National City Bank was on said last named date and is on the date hereof, indebted to the said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County in the sum of Six Hundred Forty-three Thousand, Ninety-four Dollars and Twenty-nine Cents ($643,094.29) and that the said National City Bank has now no counter-claim of any kind, character, or description against the claim of said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County as hereinbefore set forth.

This receipt and assignment is executed and delivered for the purpose merely of effectuating in so far as it is possible now to do, such rights as are conferred upon said Fidelity & Deposit Company of Maryland under the 'seventh' paragraph of said depository bond, it being neither the intent nor purpose hereof to either limit or enlarge upon the same.

In Witness Whereof, the said E. J. Groesbeck, County Treasurer of Salt Lake County, Utah, and/or Salt Lake County, have caused these presents to be executed this 5 day of May, 1922.

(Signed) E. J. GROESBECK,
County Treasurer of Salt Lake County.

COUNTY OF SALT LAKE, UTAH.
By (Signed) E. J. Groesbeck,
Treasurer.

154 I carry on the books of the bank as being the property of the bank and a part of its assets this $360,000.00 par value of Crystal Lake Farm Company bonds.

Redirect Examination of Mr. Jenkins

By Mr. Ray:

I do not carry among my claims, which are about a million and a half or a little better, the claim of the National Surety Company nor that of the Massachusetts Bonding & Insurance Company. If I were required to pay such sums as I hereafter realize from my trust to the National Surety Company and the Massachusetts Bonding Company, they would have to be added to our list of claims. In the event that they should become added by reason of the judgment of this Court and I realize fifteen per cent more on the assets, that fifteen per cent concerning which I have testified, is figured on the basis of the present claims.

Q. What percentage do you think you would then be able to pay the common creditors of the bank?

Mr. Moreton: I object to it as immaterial, irrelevant and incompetent. If these claims are to be allowed it matters not how much would be paid to the creditors of the bank; this claim, I take it, should stand on its own merits.

The Court: That would all depend on a matter of mathematics. If he has figured it out, he may answer.

Mr. Moreton: Save an exception.

If the sixty per cent were paid on the $150,000.00 of these two bonding companies, that would take $90,000.00 immediately away from us. It would take $90,000.00 to let them catch up with the rest. That would leave about seven per cent to be paid on the spread over the whole obligation, instead of fifteen per cent. Others who have claims against the bank which have been allowed would receive sixty-seven per cent instead of seventy-five per cent. Of course, these figures are purely a matter of mathematical computation. While there is nothing absolutely sure about my paying another fifteen per cent, yet that is my best judgment and estimate.

155 Exhibit 14, a letter written and delivered to Walker Brothers Bankers, of date November 6 1925, was offered by plaintiff and received in evidence and is as follows:

"November 6, 1925

Walker Bros. Bankers
City.

Gentlemen:

For the purpose of saving interest on the money heretofore deposited with you by Edward E. Jenkins, as Receiver of the National City Bank, the National Surety Company and American Indemnity Company hereby consent that payment thereof be made to the American Surety Company, but does so without prejudice or waiver of any of its rights against the American Surety Company, E. J. Groesbeck, the National City Bank and its Receiver, particularly without prejudice or waiver of the rights claimed by it in the suit brought by it against Jenkins, Receiver, of said Bank now pending in the U. S. District Court for Utah.

This letter is written in this form for the purpose of protecting any rights we may have, as above set forth, but nevertheless the payment hereby authorized shall forever release and discharge you from any and all liability to the undersigned by reason thereof.

Yours truly,

A. E. MORETON
Attorney for National Surety Company and American Indemnity Company."

A E M N G

Mr. Moreton: We offer in evidence Exhibit 15, which is a copy of the decree of the Court in the prior action, prepared and served upon the National Surety Company by Cheney, Jensen, Holman and Stephens, attorneys for American Surety Company, which decree is prepared upon their stationery, with the name of the firm printed at the bottom thereof. The purpose of this offer is simply this, the American Surety Company have offered various arguments and portions of pleadings and evidence on the part of the National Surety Company to show this matter is res judicata. We now offer the decree prepared by that firm upon their stationery to show that their theory of the former case was that nothing was involved in that case but the right of subrogation and they prepared no finding or decree as to the indemnity agreement. Will you admit that this was a copy of the decree which you served upon the National Surety

Company, this Exhibit 15, prior to its delivery to the Court for its signature?

The Court: You want them to admit that they prepared and brought into Court the decree which the Court signed, and that they asked the Court to sign the same?

156 Mr. Jensen: There is no question about that, your Honor.

The Court: Isn't that sufficient to cover your ground?

Mr. Moreton: Yes.

Mr. Ray: May it be stipulated, your Honor, I ask Mr. Moreton, that Mr. Jenkins as receiver was served by the National Surety Company in the other case with notice of each step in the proceedings beginning with the appeal to the Circuit Court of Appeals right straight through to the service upon the receiver of the notice of intention to apply for a writ of certiorari in the Supreme Court?

Mr. Moreton: The record shows that. The court has stated we may have the benefit of the records here that were used in the former case—perhaps I better offer so we will have this complete—I think it will be just as well—in the argument we have the whole record, not just part of it.

(Exhibits 16, 17 and 18 marked by the reporter)

Mr. Moreton: We offer in evidence, your Honor, Exhibit 16, which is the brief of the appellee American Surety Company in the Circuit Court of Appeals.

Mr. Jensen: No objection.

Mr. Ray: No objection.

The Court: It may be received.

Mr. Moreton: We offer in evidence Exhibit 18 which is the petition for re-hearing filed by the National Surety Company in the Circuit Court of Appeals.

Mr. Jensen: No objection.

The Court: May be received.

Mr. Moreton: We offer in evidence Exhibit 17 which is the petition for writ of certiorari filed by the National Surety Company in the Supreme Court of the United States.

Mr. Ray: No objection. May it be agreed each of those documents were served upon Mr. Jenkins as receiver?

Mr. Moreton: It doesn't show here.

Mr. Jensen: We will stipulate they were.

157 Mr. Ray: They were, were they not?

Mr. Moreton: We will stipulate each of those documents was served upon the Receiver Jenkins.

The Court: Let the record so show.

Mr. Moreton: I desire to offer an amendment to the reply of the National Surety Company, copy of which I have just handed to the Court, wherein we ask permission to amend our reply by adding thereto paragraph 25A. I desire to file this without waiving our motions to strike and in the event the Court should deny my opinions to strike portions of the answers of the defendants.

Mr. Jensen: We object to the filing of it because it is matter that is totally new matter, bringing in a totally new issue; no testimony has been submitted on it and we have not presented any evidence on it; it comes too late after both parties have rested to introduce a totally new issue that was not in the case at all before.

Mr. Ray: May I add to the objection in behalf of the Receiver, if the Court please, in addition to the objection urged by Mr. Jensen, the receiver objects to it on the ground it is immaterial and irrelevant and incompetent also as to the receiver.

The Court: I think I will let you file it.

Mr. Jensen: May we have an exception then for the sake of the record?

The Court: It may stand denied as if you had filed a written reply.

Mr. Jensen: May the plea of res judicata which we have made extend to this so there is no question about that?

The Court: Certainly.

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158 Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 3, same being the Transcript of Record on Appeal to the Circuit Court of Appeals in the case of National Surety Company appellant v. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

On pages 51 to 53 thereof, as follows:

"The Court: What is the fund that the receiver has, how much is left?

Mr. Ray: $9,143.00.

Mr. Moreton: Out of the present dividend.

Mr. Jensen: The situation is this, as I understand it, the receiver contemplates paying another dividend in the immediate future of 15 per cent, isn't it?

The Court: What I was getting at is of this fund, how much—

Mr. Jensen: The whole thing is before the court, as I understand it, under the cross complaint now, your Honor, and there has also been brought in by the cross complaint the question of the right between the surety companies to the balance of any dividends which may be paid, so we desire all of the surety companies to have an adjudication of their rights with respect to that fund.

The Court: Will someone make a statement of the issue?

Mr. Jensen: To outline the case briefly, your Honor, the situation is this, there was deposited in the National City Bank, a National Bank located in this City, by Mr. Groesbeck, as County Treasurer, at the time the bank failed, the sum of $643,094.29. The County, with this payment which has been authorized by stipulation, will have been reimbursed in full, there having been paid to it also certain amounts, by the National Surety Company, $125,000.00; by the Massachusetts Bonding Company $25,000.00, and by the American Surety Company the sum of $223,000.00 and odd dollars; of that $200,000.00 was principal, and twenty-three thousand and odd dollars was interest.

The result of all those payments is that the County is now made whole.

Mr. Groesbeck as County Treasurer, gave an official bond to the County in the sum of $200,000.00. That bond was written by the American Surety Company. The National City Bank gave as depository bonds a bond from the National Surety Company represented by Mr. Moreton here, in the sum of $125,000.00, a bond for $25,000.00 from the Massachusetts Bonding Company represented by Mr. Ray, which has been paid,—both of those having been paid; and then there was one from the Fidelity & Deposit Company for

$75,000.00, but they are not taking any part in this litigation, as I understand it. They had a direct contract that they were entitled upon payment of their amount to immediately begin sharing in dividends.

Mr. Moreton: That was in the bond itself. So they had a special contract for immediately sharing in dividends when they paid their amount.

Mr. Jensen: At any rate, they are not in this litigation and as I understand it are not making any claim to the fund. In addition, as depository security, Mr. Groesbeck held and received from the bank $360,000.00 par value Crystal Lake bonds. He has assigned those bonds to the American Surety Company. This litigation as it now stands is purely litigation between the official bondsmen, the American Surety Company on the one side and the Massachusetts Bonding Company and the National Bonding on the other, who gave bonds—the National gave a bond to Mr. Groesbeck procured by the bank to protect Mr. Groesbeck. The bond of the Massachusetts Indemnity Company was a bond both to Mr. Groesbeck and to the County, the bank being principal, and was also another depository bond."

159 On page 54 thereof as follows:

"The Court: It is a contest between these bond companies as to priority.

Mr. Jensen: That is the case, your Honor."

On pages 55 to 58 thereof as follows:

"CLARENCE COWAN, a witness produced by the plaintiff, American Surety Company, being first duly sworn, testified as follows:

My name is Clarence Cowan. I am the County Clerk of Salt Lake County and have held that position for three years past. I have with me the minutes of the County Commissioners for Friday, February 29th, 1924.

Mr. Jensen: Now, gentlemen, may I simply read this brief extract? I think all of you have examined it. Simply relates to the assignment which we got from the County.

Mr. Moreton: We want to preserve our objection to that, your Honor, upon the ground this is illegal and void as without authority of law, of no effect, for the reason that our rights had already accrued at that time.

The Court: The objection will be overruled.

Mr. Moreton: Save our exception.

Mr. Jensen: (Reads)

'Friday, February 29, 1924'—and that sheet is headed: 'Minute Book, Board of County Commissioners, Salt Lake County.'

'Mr. Frank Holman of the firm of Cheney, Jensen, Holman & Stephens appeared before the Board with a modified assignment of the County's interest to the dividend recently declared to the creditors of the National City Bank, and after discussion roll was called upon the request that the chairman of this Board of County Commissioners be authorized to sign said assignment, and the vote thereon was as follows:

Commissioner Stenaker Aye.
Commissioner Lindsay Aye.
Commissioner Burgon Aye."

(Exhibit No. 1 Marked by the Reporter).

The signature on Exhibit 1, I can identify as being the signature of E. J. Groesbeck, County Treasurer of Salt Lake County, and E. L. Burgon, Chairman of the Board of County Commissioners.

Mr. Moreton: No question about the signatures, but we object to the offer of Exhibit 1 for the same reason.

The Court: Same ruling.

Mr. Moreton: Exception.

'Assignment of Claim.

'Whereas, E. J. Groesbeck, as County Treasurer of Salt Lake County, had on deposit in the National City Bank on the date when said bank passed in the hands of a receiver, the sum of Six Hundred Forty Three Thousand Ninety Four 29-100 Dollars ($643,094.29), and

'Whereas, said E. J. Groesbeck has heretofore made an assignment of all his right to dividends of said bank in the sum of Seventy Five Thousand Dollars ($75,000.00) of said deposit, and'

Mr. Jensen: I suppose we can stipulate that it is the Fidelity Deposit Company that got that assignment?

Mr. Moreton: Yes.

Mr. Jensen: (Reads)

'Whereas, the American Surety Company of New York has paid to said E. J. Groesbeck as Treasurer of said Salt Lake County and to said Salt Lake County, the sum of Two Hundred Thousand Dollars ($200,000.00) as Surety upon the official bond of said E. J. Groesbeck as said Treasurer of Salt Lake County, and

'Whereas, said Salt Lake County has received from certain depository sureties and by way of dividends from said receiver, further sums from time to time, and its claim against said receiver by reason of said deposit is now reduced to the sum of Forty Seven Thousand Six Hundred Forty Six and 01-100 Dollars ($47,666.01) and

160 'Whereas, the receiver of said bank has on hand declared and set apart as a dividend payable on said claim, the sum of Fifty Six Thousand Eight Hundred Nine and 42-100 Dollars ($56,809.48), which he declines and refuses to pay over, and

'Whereas, after the further payment to said Salt Lake County and its said Treasurer of the said balance of Forty Seven Thousand Six Hundred Sixty Six and 01-100 ($47,666.01) Dollars, the American Surety Company of New York is entitled to be subrogated to the rights of said Treasurer, and of said County, and of said Treasurer in his individual capacity, on account of said deposit in said bank, as against said bank, and is also entitled to an assignment of all the rights and claims of said County and said Treasurer in and to the Three Hundred Sixty Thousand ($360,000.00) Dollars par value of the bonds of the Crystal Lake Farms Company held by said Treasurer as collateral security for the payment of said moneys represented by said deposit;

'Now, Therefore: For and in consideration of the premises and the sum of One Dollar and other good and valuable consideration, the said E. J. Groesbeck, as Treasurer of Salt Lake County, by and with the approval of the County Commissioners of Salt Lake County, does hereby and said Salt Lake County does hereby, assign, transfer, and set over unto the American Surety Company of New York, the surety on the official bond of E. J. Groesbeck, as County Treasurer, all rights of the said E. J. Groesbeck as Treasurer of Salt Lake County, and of Salt Lake County,

against said National City Bank on account of the balance of said deposit, except only that it is agreed and understood that said Salt Lake County is first entitled to the payment to it of Forty Seven Thousand Six Hundred Sixty-Six 01-100 ($47,666.01) Dollars of said moneys and the undersigned do hereby request the receiver of said bank to make all further payments of moneys on account of liquidation dividends on said claim to said American Surety Company of New York, after said Salt Lake County has received in full said sum of Forty Seven Thousand Six Hundred Sixty Six 01-100 ($47,666.01) Dollars, and said E. J. Groesbeck as County Treasurer of Salt Lake County, and said Salt Lake County, do hereby assign, transfer and set over unto said American Surety Company of New York all its rights and claims in and to the Three Hundred Sixty Thousand ($360,000.00) Dollars par value of the bonds of the Crystal Lake Farms Company held as security for the payment of said moneys represented by said deposit.

'In Witness Whereof the said E. J. Groesbeck as County Treasurer of Salt Lake County has hereunto set his hand and seal, and Salt Lake County has caused this assignment of claim to be executed by the chairman of its Board of County Commissioners, attested by its Clerk, this the 29th day of February, 1924.

'(Signed) E. J. GROESBECK (Seal)
County Treasurer of Salt Lake County.

SALT LAKE COUNTY.

(Signed) E. L. Burgon
(Seal) Chairman Board of County Commissioners.

'Attest:
(Signed) Clarence Cowan, Clerk,
By Fred C. Bassett, Deputy Clerk.' "

On pages 59 and 60 thereof, as follows:

"Mr. Jensen: It was the interest for holding the fund and not paying it immediately after the last dividend was allowed. I take it in view of the statement made, nobody intends to press that claim against the receiver.

The Court: Is that correct? I understood that was true as to Salt Lake County.

Mr. Jensen: As far as the American Surety is concerned, we state to the court we have no disposition to press it.

Mr. Moreton: Likewise true as to the other defendants.

The Court: It is just a contest for the principal sum now in the Receiver's hands?

Mr. Jensen: Yes."

161 The following extract from the testimony of E. J. GROESBECK, Treasurer, at page 78 thereof, as follows:

"I don't know if the American Surety Company required such an assignment before they would pay this $200,000.00. My interest in this matter lies with the American Surety Company, for the reason that if the American Surety Company is successful in establishing its rights of subrogation against the bank, my liability to it by reason of being its principal will be reduced. Other than that I have no interest in which surety company recover the subrogation."

On pages 116 to 133 thereof, as follows:

"Assignment of Error on Appeal of Appellant National Surety Company.

Comes now the National Surety Company, a corporation, one of the defendants above named and says that the decree entered in the above entitled cause on the 12th day of June, A. D. 1924, is erroneous and unjust to the above defendant and assigns the following errors upon which it will rely for a reversal of the said decree, to-wit:

I.

That the Court erred in ordering, adjudging and decreeing 'that the plaintiff American Surety Company of New York have and recover from Edward E. Jenkins, Receiver of the National City Bank, the sum of $9143.41, being the balance of a dividend declared and payable on the claim of Edward J. Groesbeck as Treasurer of Salt Lake County, against said bank,' for the reason that it appears by the evidence in said action and particularly by the depository bond furnished by said defendant National Surety Company to the plaintiffs E. J. Groesbeck as County Treasurer and to Salt Lake County, in behalf of said National City Bank, and from the applica-

tion for said bond executed by said bank, and by the undisputed testimony, that said National Surety Company has paid to said E. J. Groesbeck as County Treasurer and to Salt Lake County the full penalty of its said bond in the sum of $125,000.00; and that said National Surety Company by reason thereof and by reason of its payment of said sum as aforesaid and by operation of law, and in justice, equity and good conscience, became and is entitled to be subrogated to the amount of such payment to all the rights and claims of Salt Lake County and E. J. Groesbeck, its Treasurer, against said National City Bank and said Edward E. Jenkins as its Receiver, and that such claim is superior to any claim on the part of said American Surety Company, a corporation, and for the further reason that the undisputed evidence shows said National Surety Company has a valid claim for reimbursement from the Receiver of said Bank as provided for in said application made by said Bank for said bond, in which application said National City Bank promised to indemnify and hold said National Surety Company harmless from any loss on account of its execution of said bond for said Bank, and that if said American Surety Company has any such right or claim upon the assets or funds in the hands of said Receiver, it is subsequent and inferior to the rights of this defenadnt National Surety Company and must be postponed until such time as said National Surety Company has been made whole by reason of its said payment of $125,000.00 together with interest at the rate of eight percent per annum from the date of its payment of the same on June 5, 1922.

2.

That the Court erred in ordering, adjudging and decreeing that the plaintiff American Surety Company of New York 'is subrogated to and entitled to succeed to the rights of Salt Lake County and of Edward J. Groesbeck, its Treasurer, to all dividends that may become payable on the claim in the sum of $568,094.29 of said Edward J. Groesbeck as Treasurer of Salt Lake County against said National City Bank,' for the reason, etc. * * * *

162 3.

That the Court erred in ordering, adjudging and decreeing that the said plaintiff American Surety Company 'is subrogated to and entitled to succeed to the rights of said Edward J. Groesbeck as Treasurer of Salt Lake County and Salt Lake County, in the bonds of the Crystal Lake Farm Lands Company of the par value of $360,000.00, held by said

Edward J. Groesbeck as collateral security for the deposit of said moneys in said National City Bank, until said American Surety Company of New York shall have received on account of said dividends and/or the proceeds of said bonds, the total sum of $223,362.15, with interest at the rate of eight percent per annum on the principal sum of $200,000.00 from the 29th day of February, 1924 until paid,' for the reason, etc. * * * *

4.

That the trial Court erred in ordering, adjudging and decreeing that the said American Surety Company is entitled as against said defendant Edward E. Jenkins as Receiver to the sum of $223,362.15 and also interest at the rate of eight per cent per annum on the principal sum of $200,000.00 from the 29th day of February, 1924 until paid, for the reason that said plaintiff American Surety Company is not entitled under the law to have its said claim for interest on said sum declared to be superior to and to be paid to it before and in advance of the payment to this defendant National Surety Company of its claim on the amount of $125,000.00 paid as aforesaid.

5.

That the trial Court erred in ordering, adjudging and decreeing that 'the said Edward E. Jenkins as Receiver of the National City Bank, or any Receiver of said Bank is hereby ordered and directed to pay to the said American Surety Company of New York all said future dividends as the same are declared and payable on said claim against said Bank, until said American Surety Company of New York shall have received the said sum of $223,362.15 with interest at the rate of eight percent per annum on the principal sum of $200,000.00 from the 29th day of February 1924 until paid,' for the reason, etc. * * * *

6.

The trial Court erred in ordering, adjudging and decreeing that 'said American Surety Company of New York is hereby authorized to sell and/or otherwise dispose of said bonds and to apply the proceeds thereof to the repayment of said amounts as aforesaid,' for the reason, etc. * * * *

7.

The trial Court erred in ordering, adjudging and decreeing 'that after said American Surety Company of New York shall have received dividends and/or proceeds from said

bonds sufficient to repay to it the said sum of $223,362.15, with interest at the rate of eight per cent per annum on the principal sum of $200,000.00 from the 29th day of February, 1924, until paid, then the interpleaded defendants, National Surety Company of New York, American Indemnity Company and Massachusetts Bonding & Insurance Company, shall participate pro rata in all further dividends declared and payable on said claim and/or all balance of proceeds from the sale or other disposition of said Crystal Lake Farm Lands Company bonds, until the amount of the claims of said interpleaded defendants, as shown by their complaints in intervention, are paid in full, and any balance theerafter remaining shall belong to the Receiver of said National City Bank,' for the reason, etc. * * *

Wherefore, defendant National Surety Company prays that said decree be reversed and the United States District Court directed to enter its judgment and decree ordering, adjudging and decreeing that claim of the National Surety Company against said defendant Edward E. Jenkins as Receiver, in the sum of $125,000.00 and interest from June 5, 1922 at the rate of eight per cent per annum, should be allowed and declared as a prior lien upon the dividends in his hands and to be hereafter declared upon the claim of said Salt Lake County and E. J. Groesbeck, its Treasurer, as against him as Receiver of said National City Bank; and ordering, adjudging and decreeing that the said Edward E. Jenkins, as Re-
163 ceiver, pay to the said National Surety Company the sum of $9143.42 now in his hands as such Receiver, together with all future dividends as the same are declared and payable by him on said claim of said Salt Lake County and E. J. Groesbeck, its Treasurer, against said bank, until said National Surety Company has been paid in full for the loss sustained by it upon said bond executed by it in behalf of said National City Bank; and ordering, adjudging and decreeing that the said National Surety Company is authorized and directed to sell and/or otherwise dipsose of said bonds of said $360,000.00 par value of the Crystal Lake Farm Lands Company, and apply the proceeds thereof toward the repayment of its claim as aforesaid; and ordering, adjudging and decreeing that the plaintiff American Surety Company has no interest in or valid claim upon any of said dividends or of said bonds and shall not participate in dividends declared and payable on said claim and/or the proceeds from the sale or other disposition of said Crystal Lake Farm Lands Company's bonds, until the amount of the claim of

said National Surety Company is first paid in full; and for such other and further relief as to the Court may appear just and equitable.

ARTHUR E. MORETON
Solicitor for Defendant National Surety Company.

Copy of the foregoing Assignment of Error received this 25th day of September, 1924, and we consent that said Assignments of Error may be treated and considered as also the Assignments of Error of the defendant American Indemnity Company.

GEORGE G. ARMSTRONG
Solicitor for Plaintiff, Salt Lake County.

CHENEY, JENSEN, HOLMAN & STEPHENS,
JOHN JENSEN,
FRANK E. HOLMAN,
Solicitors for Plaintiffs American Surety Co. and E. J. Groesbeck.

E. M. BAGLEY,
ROBERT L. JUDD,
PAUL H. RAY,
Solicitors for Defendant Edward E. Jenkins, Receiver.

ROBERT L. JUDD
Solicitor for Massachusetts Bonding & Insurance Company.

ARTHUR E. MORETON,
Solicitor for Defendant American Indemnity Co.

Filed in United States District Court, District of Utah, Sep. 25, 1924 John W. Christy, Clerk"

Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 10, same being the brief of appellant National Surety Company on appeal to the Circuit Court of Appeals in the case of National Surety Company appellant vs. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

164 On pages 1 and 2 thereof, as follows:

"The Question to be Determined.

Briefly, this action grows out of the failure of the National City Bank of Salt Lake City, Utah, and on appeal is a con-

test between the American Surety Comany on the one hand and the National Surety Company on the other hand, as to their respective rights of priority in dividends declared and to be declared by the defendant Edward E. Jenkins, Receiver of said defunct Bank upon the deposit of public funds of Salt Lake County in said Bank, made by E. J. Groesbeck, Treasurer of said County, and amounting to $643,094.29 at the time of the failure of said Bank on January 17, 1922. Salt Lake County has been repaid in full the amount of said deposit by the payment to it of the sum of $225,000.00 by the three surety companies, furnishing depository bonds in behalf of said Bank, by the further payment to Salt Lake County of the sum of $200,000.00 by the American Surety Company upon the official bond of said E. J. Groesbeck, Treasurer, and by the further payment to it by the defendant Receiver of $218,094.29 in dividends.

The action resolves itself into a determination of this question: Is the American Surety Company, which executed for said E. J. Groesbeck, as Treasurer, his official bond to Salt Lake County in the penal sum of $200,000.00, entitled to priority in the payment of further dividends on said deposit, to the exclusion of and before the National Surety Company which furnished Salt Lake County, in behalf of said National City Bank, a depository bond in the penal sum of $125,000.00, receives any reimbursement whatsoever, as decreed by the United States District Court for Utah, or is the National Surety Company and the other surety companies furnishing depository bonds entitled to priority in the distribution of said dividends ahead of said American Surety Company, as claimed by them, or are each and all of these surety companies, including the American Surety Company, entitled to their pro rata share of such dividends, with priority to none?"

On pages 9 to 11 thereof, as follows:

"This action was instituted by the plaintiffs Salt Lake County, E. J. Groesbeck, its Treasurer, and American Surety Company against said defendant, Edward E. Jenkins as Receiver of said National City Bank, for the purpose of determining who is entitled to said fourth dividend of ten per cent, amounting to said sum of $56,809.42, in the hands of said Receiver. The plaintiff Salt Lake County set forth in Complaint that it is entitled to said sum of $47,666.01 in order to make it whole on account of said deposit and the said plaintiff, American Surety Company, claimed that it is entitled to the balance of said dividend together with all future dividends as declared and paid by said defendant Receiver,

together with the Crystal Lake Farm Lands Company bonds of the par value of $360,000.00, or so much of the proceeds thereof as would reimburse it for its said loss paid to said Salt Lake County in said sum of $200,000.00 (Tr. pp. 1-5)

The defendant Edward E. Jenkins, Receiver, filed his answer to said Complainant, admitting payment by said American Surety Company to said Salt Lake County of the liability upon its said bond in the sum of $200,000.00 and that he had in his hands said sum of $56,809.42, and further alleging the payment by said National Surety Company of the penalty of its said bond of $125,000.00 and the payment of the Massachusetts Bonding & Insurance Company of the penalty of its bond in the sum of $25,000.00 and that claim had been made upon him by each of said last two named companies that were entitled to subrogation to the extent of the payment made by each of them on their respective bonds to the rights and claims of Salt Lake County and E. J. Groesbeck, its Treasurer, against said National City Bank, in and to all dividends to be declared by said defendant Receiver, and alleging that the said National Surety Company had assigned and transferred to the American Indemnity Company $5,000.00 of its said claim against said National City Bank, and concluding with a prayer that the Court make an order herein requiring the National Surety Company, American
165 Indemnity Company and Massachuttes Bonding & In-
Insurance Company to set forth their respective claims to said dividend of $56,899.042 held by him, together with all future dividends that may accrue in his hands by reason of the said deposit of Salt Lake County, and that the Court determine the respective rights of each of said parties to said dividends. That thereupon the Court made and entered its order herein interpleading the said National Surety Company, American Indemnity Company and Massachusetts Bonding & Insurance Company, as defendants herein, and requiring them to set forth their respective claims, and that thereupon each of said parties filed their separate answer herein, setting forth their respective claims to said dividend in the hands of said Receiver and to future dividends that may accrue in his hands on account of the said deposit of Salt Lake County (Tr. pp. 7-12).

That the defendant and appellant National Surety Company filed its answer herein setting forth the application made to it by said National City Bank for said bonds, its execution of said bond in behalf of said National City Bank on the 3rd day of January, 1921, the failure of said Bank on the 17th

day of January, 1922, and the payment by said National Surety Co. to Salt Lake County of the penalty of its said bond in the sum of $125,000.00, and alleging that by reason of its said payment as aforesaid, it became, by operation of law, and is entitled to be subrogated to the amount of such payment to the rights and claims of Salt Lake County and E. J. Groesbeck, its Treasurer, against said National City Bank and said Edward E. Jenkins, its Receiver; that said sum of $125,000.00 was paid by it to Salt Lake County and E. J. Groesbeck and received by them without prejudice as to the claim of said National Surety Company to subrogation to the rights of Salt Lake County against said National City Bank and its Receiver to the extent of said payment, said question being left open for future determination; that said E. J. Groesbeck had failed to comply with the provisions of Section 4500 Compiled Laws of Utah, 1917, by not requiring from said Bank full and complete depository protection as required by said section; that Crystal Lake Farm Lands Company bonds of the par value of $360,000.00 at the time they were received by said Groesbeck were not, and at no time since have been worth as much as ten cents on the dollar; that the loss of the funds of Salt Lake County was occasioned by the failure of the said E. J. Groesbeck as County Treasurer, to perform the duty enjoined upon him by law, to require from said National City Bank sufficient depository protection to fully protect the public funds so deposited by him, and that had he complied with said Section 4500, his surety, the American Surety Company, would have suffered no loss; that because of the failure of the said Groesbeck to take, and because of the failure of the said American Surety Company to require him to take, sufficient depository protection, the American Surety Company suffered a loss for which it now seeks to reimburse itself at the expense of the National Surety Company; that equity and good conscience will not permit the said American Surety Company to make use of such illegal and wrongful act on the part of its principal to establish a right to dividends to the exclusion of or superior to that of the National Surety Company. (Tr. pp. 14-22)"

On pages 12 and 13 thereof, as follows:

"Specification of Errors.

The appellant National Surety Company has made eighteen separate Assignments of Error, of which Assignments Nos. 1, 2, 3, 4, 5, 6, 7 and 8, for the purpose of convenience and brevity in discussion, may be grouped together, inasmuch

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as they all relate to the alleged errors of the court in ordering, adjudging and decreeing that the claim of said American Surety Company in the sum of $200,000.00 and interest, is entitled to priority in the distribution and payment of dividends by said defendant Receiver on the said deposit of said Salt Lake County in said National City Bank and that said claim of said American Surety Company is superior to the claim of the National Surety Company for $125,000.00 and interest arising out of its payment of said sum to said Salt Lake County, as aforesaid; and said Assignments of Error are in brief as follows:"

166 On pages 21 and 22 thereof, as follows:

"The claim of the National Surety Company to be subrogated to the rights of Salt Lake County and E. J. Groesbeck, to the dividends on hand and to be paid by the receiver of said Bank, rests upon the well established, equitable principle that: 'A surety paying the debt of his principal is entitled to be subrogated to the rights of the creditor in all or any of the securities, means or remedies which the creditor has for enforcement against his principal.' (25 R. C. L. 1327). The National Surety Company, having paid the debt of its principal, the National City Bank, to the creditor, Salt Lake County, in the sum of $125,000.00, it is clearly entitled, independently of its legal right to reimbursement, to be subrogated to the right of Salt Lake County to the funds in the hands of said Receiver.

The American Surety Company, while recognizing the right of the National Surety Company to subrogation, claims that its right to subrogation is superior to that of the National Surety Company, for the reason that it claims that the said depository bond executed by the National Surety Company runs in favor of and is for the benefit of the Treasurer, E. J. Groesbeck personally, and that by reason of its payment to Salt Lake County of the penal sum of the official bond executed by it to Salt Lake County in behalf of E. J. Groesbeck as Treasurer, it is subrogated to the rights of Salt Lake County against said Bank, and that its claim of subrogation is superior to that of the National Surety Company for the reason that it claims that the said Groesbeck must first be indemnified against loss. * * *

On the depository bond executed by this appellant, National Surety Company, the National City Bank was of course the principal, the National Surety Company the surety, and Salt Lake County the creditor, and upon payment of the pen-

alty of the bond of this appellant, it became subrogated to the rights of Salt Lake County against said Bank to the extent of the amount of its payment. The right of subrogation of this appellant is therefore not only clear, but direct if we may use that expression, and the right of the American Surety Company as against said Bank, if any such right it has, is of necessity circuitous, as it will have to come through Mr. Groesbeck."

On pages 32 and 33 thereof, as follows:

"The omissions of Mr. Groesbeck are chargeable to his surety, who made the broad guarantee in his behalf that he would 'well, truly and faithfully perform all duties enjoined upon him by law.' In view of the manner of the performance of Mr. Groesbeck of his duties relative to this deposit, can it be said that the equities of his surety, which, of course, can be no greater than his own, are superior to those of the appellant National Surety Company, which is wholly without blame in this matter? The latter is an innocent party and had the right to assume that the Treasurer performed this duty enjoined upon him by law, by requiring the National City Bank to give him adequate and full protection in such amount or amounts as might be necessary from time to time, considering the amount of the deposit.

The National Surety Company has complied with the terms of its bond by making good the obligation of its principal, the National City Bank, to pay to Salt Lake County $125,000.00. The measure of its liability is the terms of its bond. But how can the American Surety Company comply with the terms of its bond? True enough, it has paid to Salt Lake County $200,000.00, the penalty of said bond, but how can it make good now the obligation of its principal to comply with the law by taking sufficient depository protection? It is now too late to remedy his failure to do so, but the least that can be required of it, and equity will demand it, is that its right of subrogation, if any, be postponed to that of the National Surety Company. Under the circumstances, can it be said that the American Surety Company comes into Court with clean hands? Is it equitable that the American Surety Company should receive any dividends at the expense of the National Surety Company?

167 The National City Bank owed no duty to the American Surety Company, yet the latter seeks to recover from the Receiver of said Bank because of the failure of its own

principal to perform the duties enjoined upon him by law. In other words, the American Surety Company, would make itself whole out of the funds in the hands of said Receiver for a loss sustained by it on account of the failure of its principal to observe the law, which it guaranteed he would do, and this, too, at the expense of a wholly innocent party. Is this equity?

'It (the right of subrogation) rests upon purely equitable grounds and will not be enforced against superior equities.' (Peoples vs. Peoples Bros. 354 Fed. 489)

'To entitle a person to subrogation, his equity must be strong and his case clear. * * * Nor will subrogation be enforced where the equities are equal or the rights not clear, * * * nor to the prejudice of the legal or equitable rights of others.' (Story's Equity Jurisprudence, 14th ed., Vol 2, Sec. 707, p. 111)

'The doctrine of subrogation does not apply every time when a surety has discharged a debt which another ought to pay, for after all equity requires that one should do what in good conscience he ought to do, and having done this it affords him no right to inflict a needless hardship upon the rights of others.' (Story's Equity Jurisprudence, 14th ed. Vol 2, Sec. 708, p, 111).

Subrogation is a doctrine of equity and is founded on principles of natural justice. It will not be allowed to the injury of the rights of others, as its object is to place a charge where it ought to rest."

On pages 43 and 44 thereof, as follows:

"It is well established that subrogation must be enforced with a due regard to the legal and equitable rights of others and cannot be used to overthrow a legal right, or a superior or equal equity. To entitle a party to subrogation, his equity must be strong and his case clear and no order of subrogation will be made in a doubtful case.

'Equity violates no law, and it does not assume to make a contract for the parties; it follows the law and upholds it, and when it comes to the relief of one to whom the law cannot afford an adequate remedy, it will not, in so doing, infringe the law or impair its force, nor will it reconstruct the contract between the parties.'

25 R. C. L. 1321

Equity will not permit the American Surety Company to obtain a right to dividends to be paid by said Receiver of said Bank superior to the legal and equitable rights of this appellant. The American Surety Company has a plain remedy at law against its principal, E. J. Groesbeck, and the remedy of this appellant is against its principal, the National City Bank.

'Subrogation is the creature of equity and it will not be permitted where it will work injustice to those having equal or superior equities, or where it will operate to defeat a legal right.'

25 R. C. L. 1312

On pages 44 and 45 thereof, as follows:

"In the trial court, counsel for the American Surety Company cited 23 R. C. L. 1318 and the note appearing in Ann. Cas. 1917 C. at page 1184, and will no doubt cite these authorities to this court, to the effect that a surety is not entitled to be subrogated to the creditor's securities until the claim of the creditor against the debtor, to secure which the securities were given, has been paid in full.

Applying this principle to this case, it simply means that until Salt Lake County had first been made whole by payment to it in full of the amount of its deposit, that none of the surety companies had any right to subrogation. However, counsel for American Surety Company would construe this to mean that until Mr. Groesbeck is indemnified that the National Surety Company cannot participate in the dividends, but such is not the proper application of this rule. * * *

168 However, in the case at bar, Salt Lake County has been made whole and there is now no necessity for invoking the rule established by the authorities last cited above. But counsel for American Surety Company say that Mr. Groesbeck is the creditor who much be made whole, and not the County and until he is first relieved of any claim that his surety, the American Surety Company, may have against him because of its loss, resulting from his failure to comply with the law, that this appellant has no claim on dividends accruing in the hands of the Receiver. But the County and not Mr. Groesbeck is the creditor in this instance and it has been made whole. In no case cited by counsel for American Surety Company was the Treasurer or other custodian of the public funds held to be the creditor rather than the public body he represented."

On page 47 thereof, as follows:

"The only case that we have been able to find determining the rights of the surety executing a depository bond as against those of a surety company executing the official bond, in the case of Cole vs. Myers, American Surety Company and National Fidelity & Casualty Company, reported in 160 N. W. at page 894."

On page 50 thereof, as follows:

"While the statute of Utah does not say that the Treasurer shall not have on deposit at any time more than the maximum amount of the depository bond, yet it in effect says the same thing when it requires that the Treasurer shall take collateral or depository bonds in an amount sufficient to fully protect the public funds. Therefore, the Treasurer, Groesbeck, having failed to take protection in an amount sufficient to proect the funds, the amount of his deposit in excess of such protection, was an illegal deposit. Just as in the case of Cole vs. Myers, this appellant had the right to assume that the Treasurer would comply with the Statute and fully protect the funds. And just as in that case, this appellant's liability and the debt protected by its bond was limited to the amount thereof, and when this appellant paid the amount thereof it not only discharged its legal liability but also discharged the entire debt to secure which its bond was given. Here, too, a construction of Section 4500, Compiled Laws of Utah, 1917, and the other statutes relating to the duties of the Treasurer, will admit of no other conclusion. Had Treasurer Groesbeck complied with the law, he would have incurred no personal liability, nor would his surety have suffered a loss, and the only just conclusion that can be reached here is that neither the Treasurer nor his surety will be permitted to make use of this wrongful act to establish a right to dividends superior to that of this appellant."

And on pages 50 and 51 thereof, as follows:

"The depository bonds given by the surety companies pursuant to Section 4500, were not given for the protection of the Treasurer nor his official surety, as the American Surety Company now contends. Particularly such is the case when the Treasurer fails to protect himself and his surety by not complying with the terms of Section 4500. As pointed out in the case of Cole vs. Myers, the purpose of such a statute is to protect the public funds. We have been unable to find and do not believe that counsel for the American Surety Company can find a single case where a depository surety was held to be an insurer of the Treasurer against loss to himself

personally, or a single case where the depository surety company has been excluded from dividends to the benefit of the surety on the official bond."

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169 Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 16, same being the brief of the American Surety Company on appeal to the Circuit Court of Appeals in the case of National Surety Company appellant vs. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

On pages 2 and 3 thereof, as follows:

"By virtue of assignments from Salt Lake County and E. J. Groesbeck, and likewise by virtue of general equitable principles, the American Surety Company of New York now asked to be subrogated to their rights to all future dividends paid on E. J. Groesbeck's deposit until either through them or by the application of other collateral it has been made whole. * * *

While Salt Lake County, the obligee of the American Surety Company has been made whole, E. J. Groesbeck, the obligee of the National Surety Company, has not. The bank has not yet paid him fifty per cent of his deposit and he is still obligated to the America Surety Company of New York for the full amount it has paid out. Notwithstanding this situation, the National Surety Company now claims right of subrogation as to future dividends on E. J. Groesbeck's deposit and as to the Crystal Lake bonds, prior to the American Surety Company of New York, the assignee of E. J. Groesbeck and Salt Lake County, and in this case the National Surety Company is appealing from a decree of the District Court, holding that it was not entitled to such rights until its obligee, E. J. Groesbeck had been made whole.

The primary questions in this case are, therefore:

First. Now that Salt Lake County has been paid in full, which Surety Company is entitled to priority as to dividends from the receiver, on E. J. Groesbeck's unpaid deposit, as County Treasurer, with the bank?

Second. What are the rights of the two Surety Companies with respect to the $360,000.00 par value Crystal Lake bonds taken by E. J. Groesbeck as aforesaid and subsequently assigned to the American Surety Company of New York?"

On pages 8 to 10 thereof, as follows:

"Appellants' counsel reminds us that as an additional contractual fact the National Surety Company had an agreement for indemnity with the National City Bank (Appellants' Brief 18 to 23 and Tr. 87). We deem this agreement wholly immaterial to the issues of this case, but we refer to it here to get before the court all the alleged contractual relationships of the parties.

Contentions of the National Surety Company

As we understand them, the contentions of the National Surety Company are substantially as follows:

I.

That the indemnity agreement of the bank, embodied in the bank's application to the National Surety Company for depository bond, gives the National Surety Company a direct legal right, not to indemnity out of the general assets of the bank as such, but to indemnity out of the dividends declared and payable upon the claim of Mr. Groesbeck (Appellant's Brief 18 to 23). * * *

Argument.

I.

We shall examine and consider the contentions of the National seriatim.

The contention that the National has a legal right, through the Bank's promise of indemnity, to take its indemnity out of the dividends payable on the Treasurer's claim, is another way of saying that the National by contract with the Bank, to which the Treasurer was not a party, acquired a right against the Treasurer to take or share in his dividends."

On page 11 thereof, as follows:

"It is very clear from the foregoing case, and clear upon principle, that the indemnity agreement between the
170 Bank and the National must be treated as a separate contractual arrangement affecting only the National and the Bank. Whether it constitutes a sufficient basis for some direct claim against the Bank, is interestingly discussed by the dissenting opinion in the foregoing case of U. S. F. & G. Co. vs. Carnegie Trust Company. * * * Surely the National cannot because it has an agreement with the Bank for indemnity, push the Treasurer aside before he has been paid in full upon his approved claim, and step in and receive divi-

dends on that claim, either to his exclusion or pro tanto. Certainly a surety of the Bank cannot by virtue of an indemnity agreement with the Bank alone, be entitled to share ahead of a depositor or a depositor's assignee and subrogee."

On pages 12 of said brief of American Surety Company, Exhibit 16, as follows:

"We submit that both upon principle, as a plain matter of contract, and upon the authority of the case above mentioned, there is nothing in the National's so-called indemnity agreement with the Bank that gives it any standing or any rights in the present litigation."

On page 15 of said brief of American Surety Company, Exhibit 16, as follows:

"When the Treasurer, or when the American as subrogated to and as assignee of his rights, is made whole, then the National is entitled to subrogation as against the Bank; that is to say after the Bank pays the claim of its depositor, the Treasurer, in full, the National is then entitled to be subrogated to the Treasurer's rights against the Bank, but not until then."

On page 19 of said brief of American Surety Company, Exhibit 16, as follows:

"It follows, therefore, that the National, neither through its creditor, the Treasurer, nor through its principal, the Bank, has acquired any rights and that under neither rule is it entitled to subrogation. The National is claiming rights of subrogation under facts and circumstances where no such rights can arise. * * *

If, therefore, the appellant is to be allowed any rights of subrogation in this case, it cannot be under the general principles of subrogation which have heretofore been laid down by this court and other courts, but must be under some exception of those general rules."

On page 22 of said brief of American Surety Company, Exhibit 16, as follows:

"As already stated, the reasoning in Ex Parte Rushforth has been severely criticised particularly in the case of Knafft vs. Knoxville Banking & Trust Company, 182 S. W. 232, but even if this court should approve the exception laid down in

Ex parte Rushforth it is submitted that the National has not brought itself within that exception, that the entire debt protected by its suretyship has not been paid to its creditor, Groesbeck, and that the National is, therefore, without any right of subrogation, either under the well established general rules of equitable subrogation or under the doubtful exception of Ex parte Rushforth."

On page 23 of said brief of American Surety Company, Exhibit 16, as follows:

"We submit that, under the foregoing state of facts, which we believe is an accurate statement of the facts of the instant case, the lower court was right in refusing the National subrogation while the debt of its principal to its obligee remained unpaid and while its obligee stood damaged to the extent of $223,362.15. The National, having no contract with its obligee for conventional subrogation, is in a court of equity setting up a claim to subrogation to the detriment of its obligee."

On page 25 of said brief of American Surety Company, Exhibit 16, as follows:

171 "It is true that the National originally took the position that when it paid the penalty of its bond, in the sum of $125,000.00, it was then entitled to immediate subrogation and entitled to share in future dividends with Groesbeck and the County. However, the National later recognized that its position was untenable, receded from it, and acquiesced in further payments to the Treasurer and the County until the County had been paid in full."

On page 46 of said brief of American Surety Company, Exhibit 16, as follows:

"It is submitted that the natural equities of the case are all with the Treasurer and that as a matter of good conscience the National should not be allowed any rights of subrogation until the Treasurer or his assignee, The American, has received dividends sufficient to fully protect the Treasurer against the liability which he will otherwise sustain on account of interest."

On pages 47 and 48 of said brief of American Surety Company, Exhibit 16, as follows:

"In final summary and conclusion, the appellees call to the attention of the Court the following points:

First: That the contractual relations existing in this case are clear and definite as between the parties involved; that the American had privity with the Treasurer and the County, the American being surety of the Treasurer, as principal, for the County as creditor; that the National had privity with the Bank and the Treasurer, the National being the surety with the Bank as principal, for the Treasurer as creditor; that the National had no privity with the County; that the Treasurer owed the County the amount of public funds deposited by him in the Bank, his debt to the County being secured by the American; that the Bank owed the Treasurer the amount of his deposit therein, that debt from the Bank to the Treasurer being secured by the National, by the Crystal Lake Farm bonds and by other depository security; that the attempt of the National to disturb this contractual situation was abortive and that that situation remains standing, except that by virtue of the assignments of the County and the Treasurer to the American, the latter stands, not merely by subrogation but also by definite contract, in their shoes; that neither the Treasurer nor the County were in any manner parties to the indemnity agreement between the National and the Bank."

Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 9, same being the reply brief of appellant National Surety Company on appeal to the Circuit Court of Appeals in the case of National Surety Company appellant vs. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

On pages 3 to 8 of said reply brief of National Surety Company, Exhibit 9, as follows:

172 "In order to sustain the decree of the trial court, the American is obliged to contend: 1. That this deposit was the Treasurer's and not the County's. 2. That the County has no interest whatever in this deposit of public funds. 3. That the only relation between him and the County was that of debtor and creditor. 4. That the County has no interest whatever in the security taken by him pursuant to Section 4500, for the protection of the public funds, and that the depository bonds given pursuant to said Section are solely for his personal benefit. 5. That the only recourse of the County for the loss of its funds, occasioned by the failure of the Bank, is to look to the official bond of the Treasurer for settlement.

The questions to be determined foremost in this case, are: A. Was the deposit in question the property of the County, as contended by the National, or the property of the Treasurer, as contended by the American, and what is the relation between the County and the Treasurer and the Bank relative to said deposit? B. For what purpose and for whose benefit was the bond of the appellant National Surety Company given? Was it given for the protection of the public funds or was it given to the Treasurer for his sole benefit, as an insurance policy to protect him against loss?

Contractual Relationship of the Parties.

A. Was the deposit in question the property of the County or the Treasurer? * * * *

It is therefore manifest from the facts, the manner in which this account with the National City Bank was kept and treated by the County, its Treasurer and the Bank itself, and in fact by all parties concerned, independent of the legal authorities upon the question, that the title and ownership of this deposit was in Salt Lake County.

B. For what purpose was the bond of the National given?

The American contends that because the name of the obligee expressed in the bond of the National is 'Edward J. Groesbeck, Treasurer of Salt Lake County, Utah,' that the bond of necessity must run to him personally, notwithstanding the provisions of Section 4500, and is his individual property. * * * *

The bond of the National was designed for the protection of public funds. If the Treasurer desired a bond to protect himself against loss on account of the failure of the depository or because of fire, hold-up or robbery, or any of the contingencies by which he might have lost the public funds without his personal fault, he should have secured an insurance policy to that end,"

On page 10 of said reply brief of National Surety Company, Exhibit 9, as follows:

"The purpose of depository laws is to provide a safe place for the keeping of the public funds and at the same time to enable the public to receive compensation for the use of its funds. Statutory provisions relating to depositories should be read in connection with the bond.

In this case the National Surety Company had the right to rely on the Treasurer's keeping the amount of the deposit

within the amount of protection taken by him. (Fremont County vs. Fremont County Bank, 115 N. W., 925.)"

On pages 12 to 31 of said reply brief of National Surety Company, Exhibit 9, as follows:

"II

Under subdivision two of its brief, the American treats of the question as to who was the depositor, but at no
173 point in their discussion of this subject do they demonstrate that Groesbeck was the creditor rather than the County, but throughout their argument upon this point, simply assume that Groesbeck was the creditor. * * * *

So, after all is said and done, this case is really a contest between the National, which the American has called in its brief a 'hired surety' (page 46) and the American, which out of courtesy we will call a 'Compensated' surety.

III.

The American Surety attempts to distinguish the case of Cole vs. Myers, 160 N. W. 894, cited by appellants, from this case, and says that the Nebraska Court in that case held that by making an over deposit contrary to the letter of the law, the Treasurer incurred a personal liability to the County 'which otherwise would have had no existence.' * * * * After all, this case is a contest between the American and the National Surety Company, and the loss of the American Surety Company is directly traceable to the failure of its principal to comply with Section 4500, which it guaranteed that he would do. * * * *

IV.

The American complains that throughout the brief of the National it has treated the Crystal Lake Farm Land bonds in all respects like the dividends. We say they are to be treated in all respects just as the dividends were treated, because the depository bonds and the Crystal Lake Farm Land bonds were given for the same purpose, to-wit, to protect the public funds. * * * *

V.

The American has construed what we said in our original brief with respect to the assignment taken by it from the County and the Treasurer to the effect that such an assignment could not in any way affect the rights of the National

to subrogation from Salt Lake County already acquired by its payment to the County of the sum of $125,000, as an attack upon the assignment. * * * *

The trial court ignored any right that the American may have obtained by assignment, and based its decree in favor of the American entirely upon the theory of subrogation. (Tr. 47). However, counsel for the American Surety Company prevailed upon the trial court to hold that the Treasurer and not the County was the depositor and creditor of the bank, as is shown by the fact that the court awards to the American 'all the dividends payable on the claim in the sum of $568,094.29 of Edward J. Groesbeck, as Treasurer of Salt Lake County,' and also decree that the American is entitled to be subrogated 'to the rights of said Edward J. Groesbeck and of Salt Lake County in the bonds of the Crystal Lake Farm Lands Company of the par value of $360,000 held by said Edward J. Groesbeck as collateral security for the deposit of said moneys.' In other words, the trial court arrived at the conclusion that the collateral and depository bonds given by the bank were for the personal benefit and protection of the Treasurer rather than for the protection of the public funds, and that he rather than the County was the depositor and creditor of the bank, and that the relation between the Treasurer and the County was that of debtor and creditor. It is apparent that the Trial Court agreed with these same contentions that are also made in this court by the American Surety Company. * * * *

VI.

In reply to our complaint that the trial court should not have allowed the American interest in the sum of $23,362.13 accruing on said sum of $200,000 up to February 29, 1924, together with additional interest at the rate of eight per cent per annum from said 29th day of February, 1924, counsel for the American Surety Company say: 'If the American had paid the $200,000 on demand, the $23,362.13 interest would then have accrued in favor of the American as against Groesbeck.' * * * *

The whole argument of the American Surety Company with respect to its right to interest is based upon the theory that the Treasurer and not the County was the depositor, and its theory seems to be that neither the Treasurer nor the American should in any manner be liable for the Treasurer's

failure to protect the public funds. It says that to
174 withhold payment from the American 'would be to prefer the hired surety of a failing bank at the expense of its depositor.' In answer to this statement, we say that in the first place the Treasurer was not the depositor, but the County, and it has been repaid in full; in the second place, if it should be held that the Treasurer was the depositor, his liability to his surety, the American, has been settled; and in the third place, it is manifest that this action is a contest between two hired sureties; and in the fourth place, it is only these hired sureties that have suffered any loss. Throughout this entire case it is apparent that this hired surety, the American Surety Company, has been attempting to lift itself with the bootstraps of the Treasurer although he no longer has any interest in this litigation and cannot be affected thereby."

On pages 33 to 35 of said reply brief of National Surety Company, Exhibit 9, as follows:

"In conclusion, the appellants respectfully submit that it has been established:

1. That the County and not the Treasurer was the depositor in the said National City Bank.

2. That the credtor of the Bank was the County.

3. That the depository bonds and collateral security given by the Bank, were for the protection of the public funds and did not operate as indemnity to the Treasurer, to save him and his surety against loss.

4. That by its payment to the penalty of its bond in the sum of $125,000.00 to Salt Lake County, the National Surety Company became subrogated to the rights of Salt Lake County against said Bank, and that its right of subrogation from Salt Lake County, together with its legal rights arising from the indemnity agreement executed by the said Bank, are superior to any rights of the American Surety Company, and that the National Surety Company is entitled to be repaid in full before the surety of the Treasurer, whose failure to protect the public funds was the proximate and direct cause of the loss to his surety. That because of the failure of said Groesbeck to take, and because of the failure of the American Surety Company to require him to take, sufficient depository protection, and because of the liability assumed by the American Surety Company by reason of the execution of its bond wherein it guaranteed that the Treasurer would comply

with Section 4500, it suffered a loss, from which it now seeks to reimburse itself at the expense of the National Surety Company; That equity and good conscience will not permit the said American Surety Company to make use of such illegal and wrongful act on the part of its principal to establish a right to dividends to the exclusion of or superior to that of the National Surety Company, as decreed by the trial Court.

5. It is submitted that this action is a contest between the two surety companies, as is shown by the evidence herein and by the decree of the trial court.

6. That the County has no claim as against the Treasurer and that the only claim that can be asserted against him arises in favor of the surety companies, for his failure to perform his duty, and of the two surety companies, this appellant, which is an innocent party, is, in equity, to be preferred to the surety which guaranteed that he would perform his duty. As held in the Cole case, 'by making an over-deposit, contrary to the letter of the law, the Treasurer incurred a personal liability to the County which otherwise would have had no existence.' Neither the Treasurer or his surety will be permitted to make use of this wrongful act to establish a right to dividends superior to that of the bank's surety. The loss of the American is traceable to the illegal conduct of the Treasurer in making deposits in excess of the depository protection taken by him. For this wrongful act on the part of the Treasurer, neither the Bank's surety nor the County is in any wise responsible. If the Treasurer had complied with the law, the debt of the Bank to the County would
175 have been paid in full, and the right of this appellant to subrogation would be unassailable. To deny or postpone subrogation because the Treasurer, for whose wrongful act the Bank's surety was not responsible, makes over deposits in violation to the law would extend the liability of this appellant beyond that created by the contract of suretyship.'

In our opening brief we challenged counsel for the American to find a single case where a depository surety was held to be an insurer of the Treasurer against loss to himself personally, or a single case where the depository surety company has been excluded from dividends to the benefit of the surety on the official bond. No such case has been cited by the American.

In conclusion, it is therefore most respectfully submitted that the decree of the trial court should be reversed and a decree entered in favor of the appellants, as prayed for.

ARTHUR E. MORETON
Attorney for Appellants, National Surety Company and American Indemnity Company."

Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 18, same being Petition for Rehearing of National Surety Company in the Circuit Court of Appeals in the case of National Surety Company appellant vs. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

On pages 1 to 3 of said Petition for Rehearing, as follows:

"United States Circuit Court of Appeals Eighth Circuit

December Term 1924.

National Surety Company, a Corporation, Appellant,
No. 6819 vs.
Salt Lake County, A Subdivision of the State of Utah, et al.,
Appellees.

Appeal from the District Court of the United States for the District of Utah.

Petition for Rehearing.

Now comes the National Surety Company and the Americant Indemnity Company, the appellants in the above-entitled cause, and each of them, and move the court for a rehearing herein and for the following reasons; that is to say:

I.

The Court erred in holding and determining that the Treasurer of Salt Lake County is merely the debtor of the County, rather than its agent with respect to the deposit made by him of the public funds of said
176 County in the National City Bank, in the sum of $643,-094.29, and that the National City Bank is in turn the debtor of the Treasurer rather than of Salt Lake County in the same amount.

II.

The court erred in holding and determining that the depository bond given by the appellant National Surety Com-

pany was given for the personal benefit of the Treasurer rather than for the protection of the public funds and that in effect Salt Lake County had no interest in the depository bonds given by the appellant National Surety Company and other companies, as well as the collateral given by the said Bank, conditioned for the safekeeping of the public funds of said County.

III.

The court erred in holding and determining that the Treasurer was not negligent in taking from the National City Bank the Crystal Lake Farms Company bonds of the par value of $360,000.00 as collateral security for the deposit of the public funds of Salt Lake County in said Bank.

IV.

The court erred in holding and determining that there was fraud on the part of the said National City Bank with respect to representations as to the value of the bonds of the Crystal Lake Farms Company, and that the negligence of the Treasurer was induced by the fraud of the National City Bank.

V.

The court erred in affirming the decree herein with reference to the allowance of interest to the American Surety Company on the sum of $200,000.00.

VI.

The court erred in affirming the decree herein holding that the American Surety Company is entitled to be first paid in full from the dividends paid and to be paid by the Receiver of the National City Bank before these appellants receive anything.

VII.

The court erred in not holding and decreeing that the American Surety Company and the appellant National Surety Company were sureties for the same debt and that their rights were at least equal and that dividends upon the deposit of Salt Lake County in said National City Bank and proceeds from the Crystal Lake bonds be shared by them pro rata.

Respectfully submitted,

ARTHUR E. MORETON,
Attorney for Appellants National Surety Company and American Indemnity Company."

On pages 4 to 6 of said Petition for Rehearing, Exhibit 18, as follows:

"Suggestions in Support of Petition for Rehearing.

It is our hope to avoid extending this presentation beyond reasonable bounds, and also to avoid repetition and re-threshing of old straw so far as possible.

I.

The decision of this honorable court hinged primarily, and necessarily so, on the finding as to who is the creditor of the National City Bank with respect to this deposit of $643,094.29 of the funds of Salt Lake County, and secondarily, on the finding as to the purpose for which the bond of the appellant National Surety Company was given. The finding as to who is the creditor of the Bank to a large extent, determines for what purpose and for whose benefit appellants bond was given.

The decision of this court to the effect that the Treasurer is merely the debtor of the County and the Bank is the
177 debtor of the Treasurer, rather than the County, is a matter of great public interest and of great concern generally to all governmental bodies. This court, in our opinion, should hesitate before establishing such a doctrine, for it will, indeed, lead to pernicious practices, if we may be pardoned for so stating, and it is a doctrine that will be fraught with many difficulties, as well as disastrous results.

The finding that the National City Bank was the debtor of the Treasurer rather than the County is a mixed question of law and fact. We respectfully urge that the Opinion herein is contrary to law and fact. We think that the facts in this case show conclusively and indisputably that the County and not the Treasurer was the creditor of the Bank, for the following reasons:

1. The deposit was carried in the Bank in the name of Salt Lake County, Utah, as is shown by the statements of the Bank to the County. (Exhibits 4 and 5, Tr. 65-67). This proves that the title and ownership of the money was in Salt Lake County and not in the Treasurer.

2. In order to draw against this deposit, the Treasurer was obliged to have the counter-signature of the County Auditor, as shown by the checks drawn against this deposit. (Exhibits 6 and 7, Tr. 68; Exhibit 8, Tr. 69-70). It thus clearly appears that the deposit was treated by the Bank, by Salt

Lake County and by its Treasurer as that of Salt Lake County.

3. The Treasurer is expressly forbidden by Section 8235, Compiled Laws of Utah, 1917 (the full text of which is set forth in our original brief, at page 24) from paying out any portion thereof for any purpose, unless authorized by law.

It therefore appears conclusively to us that at all times the money deposited with said Bank was and is the property of Salt Lake County and that the Bank and later its Receiver, treated and considered the deposit as that of Salt Lake County, that the relationship of debtor and creditor does not exist between the Treasurer and the County, but does exist between the Bank and the County.

Apparently none of the above matters, which we think are controlling in this case, were considered by this honorable court, at least they were not commented on in the Opinion of this court.

The decision of this court, in effect holds, and if permitted to stand will, unfortunately, be hereafter quoted as an authority for the following propositions:

1. That the relationship between the County and its Treasurer is that of creditor and debtor.

2. That the State, County or any other political subdivision thereof, has no interest whatever in the deposit of their public funds once they have been deposited in the Bank by the Treasurer.

3. That the State, County or other political subdivision has no interest in the security taken by its Treasurer pursuant to Section 4500 Compiled Laws of Utah, 1917, for the protection of the public funds.

4. That depository bonds given pursuant to said Section 4500 are for the protection of the Treasurer rather than the public funds.

5. That the only recourse of the County for the loss of its funds, occasioned by the failure of a bank, is to look to the official bond of the Treasurer for settlement."

On pages 32 to 35 of said Petition for Rehearing, Exhibit 18, as follows:

"May we, in conclusion, suggest that, in our opinion, this honorable court erred in the following respects:

I.

That it considered the official bond written by the American Surety Company in behalf of the Treasurer as a mere 'fidelity bond,' and it is denominated as such and nothing more in the opinion of this court. We respectfully urge that in our opinion the bond of the American Surety Company is in effect an indemnity bond, as held by the Utah Su-
178 preme Court in the case of Salt Lake County vs. American Surety Company, 222 Pac. 600. This bond provides that the Treasurer 'shall well and truly account for and pay over all moneys coming into his hands and shall well, truly and faithfully perform all duties required of him by law,' and among which duties was that of requiring from the depository bank sufficient collateral or depository bonds to fully protect the public funds. In other words, the obligation of the American Surety Company is co-extensive with that of its principal, the Treasurer, and its liability under its bond, therefore, was something very much more than that of a surety on a mere fidelity bond.

2.

The court, in our opinion, erred in finding that the Treasurer rather than the County is the creditor of the bank, for the reasons following:

A. The deposit was carried in the name of Salt Lake County.

B. In order to draw against the deposit, the Treasurer was obliged to have the counter-signature of the County Auditor.

C. The Treasurer is the mere custodian of the County's funds and the County Auditor is the disbursing officer.

D. The Treasurer is expressly forbidden by the laws of Utah, (Sec. 8235 Comp. Laws of Utah, 1917) from paying out any portion thereof unless authorized by law.

E. The dividends on the deposit were paid to the County.

F. The depository bonds were enforced by and paid to the County.

G. The decisions of the Utah Supreme Court are controlling.

3.

This court, in our opinion, erred in finding that the Treasurer rather than the County was the obligee of the depos-

itory bond executed by this appellant, for the reasons following:

A. The Treasurer was but the nominal obligee, the real obligee being the County and the purpose of the bond being to protect its public funds.

B. The legislature authorized the reduction of the Treasurer's bond from $4,000,000 to $200,000, relying upon the depository bonds for the protection of the public funds, in lieu of the larger official bond theretofore required of the Treasurer.

C. The penalties of the respective depository bonds were enforced and collected by the County itself rather than the treasurer.

4.

This court, in our opinion, erred in arriving at the following conclusions, which we respectfully submit are not based upon the facts or upon law, and which conclusions, erroneously arrived at, of necessity led the court to erroneously affirm the decree.

A. That the bond of the American Surety Company was a mere fidelity bond rather than an indemnity bond.

B. That Groesbeck, Treasurer of Salt Lake County, was the obligee of appellant's bond.

C. That the deposit made the bank the debtor of Groesbeck and that the relation of debtor and creditor was created between the Bank and Groesbeck.

D. That the relation of Debtor and Creditor only existed between the County and Groesbeck. * * * *

We think, upon consideration of the foregoing, the court should entertain the application for rehearing herein.

Wherefore, it is submitted that the Petition for Rehearing in the above entitled cases should be granted.

Respectfully submitted,

ARTHUR E. MORETON
Attorney for Appellants National Surety Company and American Indemnity Company."

179 Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 17, same being Petition for Writ of Certiorari and brief in support thereof of National Surety Company, in the case of National Surety Company appellant v. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

On page 2 of said Petition for Writ of Certiorari, Exhibit 17, as follows:

"Briefly, this action grows out of the failure of the National City Bank of Salt Lake City, Utah, and is a contest as to respective rights to priority in dividends declared and to be declared by Edward E. Jenkins, Receiver of said defunct Bank, upon the deposit of public funds of Salt Lake County in said Bank, made by E. J. Groesbeck, Treasurer of said County and amounting to $643,094.29 at the time of the failure of said bank on January 17, 1922."

On page 8 of said Petition for Writ of Certiorari, Exhibit 17, as follows:

"The Question To Be Determined.

This action resolves itself into a determination of this question: Is the respondent American Surety Company, which executed for said Treasurer Groesbeck his official bond to Salt Lake County in the penal sum of $200,000.00, entitled to priority in the payment of further dividends on said deposit, to the exclusion of and before the petitioner National Surety Company, which furnished Salt Lake County, in behalf of said National City Bank, a depository bond in the penal sum of $125,000.00, receives any reimbursement whatsoever, as decreed by the United States Circuit Court of Appeals for the Eighth Circuit, or is the National Surety Company entitled to priority in the distribution of said dividends ahead of said American Surety Company, or are each of these surety companies entitled to their pro rata share of such dividends, with priority to none?"

Plaintiff National Surety Company designated and offered in evidence that part of Exhibit 19, same being brief of American Surety Company on Petition for Writ of Certiorari, in the case of National Surety Company appellant vs. Salt Lake County, et al., No. 6819, and the same was received in evidence, as follows:

"III.

The Essential Question In The Court Below.

The ultimate question for determination by the court under the situation above set forth was: The County having been paid in full, which one of the two surety companies became entitled to priority as to dividends upon the deposit of Groesbeck, and as to the Crystal Lake Farm Lands Bonds? The National claimed right of subrogation prior to, or at least pro rata with, the American, which, not only by assignment but also, as it asserted, upon the usual eqitable principles of subrogation, was in the shoes of Groesbeck and the County. The National asserted that
180 the County, not Groesbeck as Treasurer, was the depositor and creditor of the Bank; that the National was depository surety to the County, not to Groesbeck, in spite of the fact that the latter, not the County, was the named obligee in its bond (Record 89, 90); and that, the County having been paid in full, the National was subrogated to the County's claim against the Bank and entitled to be reimbursed first, or pro rata, through dividends upon the deposit and through the collateral. To the contrary, the American contended that under the undisputed contractual facts, including the terms of the bond, and under the decision of the Supreme Court of Utah in Salt Lake County vs. American Surety Company of New York, supra, Groesbeck, not the County, was the depositor of the Bank; that the County was the creditor of Groesbeck and his surety, the American, not of the National; that to whatever rights the County had, either against the Bank or Groesbeck, the American, not the National, was subrogee and assignee; and that the American was subrogated to the rights of Groesbeck against the Bank; that the National brought itself within no rule of equitable subrogation, but was left standing upon the case of Cole vs. Myers, 100 Neb. 480, 160 N. W. 894, or the case of Ex parte Rushforth, 10 Ves. Jr. 409," both of which were distinguishable and the latter discredited; and the American relied upon the following cases typifying the settled rule to the effect that subrogation will not be permitted in favor of a surety to the detriment of its obligee. United States vs. National Surety Company, 254 U. S. 74, 65 L. Ed. 143; Knaffl v. Knoxville etc. Company, 133 Tenn. 655, 182 S. W. 232; Ann. Cas. 1917-C, 1182; National Surety Company vs. State Savings Bank, 156 Fed. 21; Note, 9, A. L. R. p. 1596 et seq; 25 Ruling Case Law, Subrogation, p. 1318, Sec. 6. The National contended further

that by negligence and unlawful conduct in making deposits in the Bank pursuant to Section 4500 Compiled Laws of Utah, 1917, Groesbeck, and thereby his surety, the American, forfeited the rights they might otherwise have had to reimbursement ahead of the National as depository surety and the American to the contrary contended that the record failed to show negligence or violation of law under any interpretation of that statute. These points and the ultimate question of subrogation the District Court of the United States and the United States Circuit Court of Appeals, the latter tribunal unanimously, decided in favor of the American, holding the latter entitled to priority to dividends upon the deposit and to priority as to the collateral security, until its payment upon Groesbeck's debt to the County and interest thereon was repaid in full.

IV.

The Grounds Urged For The Writ And Response Thereto."

On page 7 of said reply of American Surety Company to Petition for Writ of Certiorari, Exhibit 19, as follows:

"But the circuit Court of Appeals held, not this, but that the County was not upon all views the creditor of the Bank, as the National insisted, notwithstanding that the money deposited in the Bank was in some aspects there as a trust fund; that in such view as was necessary to determine the rights of subrogation though of course not necessarily upon all views, the Treasurer was the debtor of the County and the Bank the debtor of the Treasurer, not the County."

On page 9 of said reply of American Surety Company to Petition for Writ of Certiorari, Exhibit 19, as follows:

"Instead of having departed from this rule, the Circuit Court of Appeals in the instant case, as indicated in the quotation above from the opinion, itself decides that the Treasurer, in such view as is necessary to determine the question of subrogation, is the debtor of the County and the Bank the debtor of the Treasurer."

181 On page 15 of said reply of American Surety Company to Petition for Writ of Certiorari, Exhibit 19, as follows:

"Cases are numerous holding, under language similar to that in the National's bond, that such a bond stands back of

the entire deposit, not simply such part thereof as is equal to the penalty, and therefore holding that there is no subrogation until the whole debt has been paid."

On page 18 of said reply of American Surety Company to Petition for Writ of Certiorari, Exhibit 19, as follows:

"The case involves merely a private dispute as to subrogation between surety companies."

(At the conclusion of the evidence and of the argument, the Court said:)

The Court: Gentlemen, I gave this case considerable thought last night after the argument and I hardly think it worth while to take your time to argue it further or to file briefs.

It seems to me clear, notwithstanding the theory relied upon by the plaintiff in this action to distinguish it from the former case, that the subject matter of the litigation is the same and that the former case has disposed of the subject matter definitely and that nothing is left to be disposed of in this case otherwise than therein determined.

In that case the Circuit Court of Appeals affirmed the judgment of this court giving priority of payment to the American Surety Company of the amount due it through Mr. Groesbeck before the plaintiff in this case can be paid anything.

Now you cannot change that decree by changing the theory of your cause of action. The subject matter of this litigation has been disposed of.

Without doubt by the payment of the $125,000, the penalty of its bond, the bank became indebted to the plaintiff, and it is a just debt and should be paid, but it cannot be paid at the expense of other claimants upon the funds
182 of the bank, and this court cannot decree such payment, even if it believed plaintiff entitled to such a decree, in face of the disposition which has been made of these funds by the decision of this court and by the opinion of the Circuit Court of Appeals.

It is hardly necessary, it seems to me, now to discuss the merits of this case. They were gone into thoroughly in the former case. The outcome of plaintiff's theory in this case and in the former case would be that while it would pay in

the first instance $125,000 the penalty of its bond, with one hand, it would hold out its hand to the Receiver to get back $93,750.00, and as a matter of fact, when you work it out, it would only have actually contributed $31,250.00 to make up this deficiency. But however we may discuss it, assuming that sore of result could be accomplished rightfully under the facts in the case, how can this court at this time and in this suit authorize such payment? As already said, by the decree in the former suit no funds are available for the liquidation of the plaintiff's indebtedness until Mr. Groesbeck as treasurer, or his guarantor, the American Surety Company, has been made whole. That judgment must stand.

I think a proper decree in this case will be one declaring plaintiff's claim to be a valid claim against the bank and allowing it as a claim against the bank. The Receiver should be directed and authorized to pay it out of the funds coming into his hands from the assets of the bank, with this proviso, that the American Surety Company shall be paid as decreed in the former case. If there was any overplus due Mr. Groesbeck after the payment of the American Surety Company in making it whole, then there should be a further proviso that plaintiff shall not be paid until Mr. Groesbeck has been made whole, but as I understand it, Mr. Groesbeck will have nothing coming to him after the American Surety Company has been fully reimbursed.

Now it may happen that these Crystal Lake Bonds may be worth something in the future. If that should occur and there should be enough to reimburse the treasurer in full and leave something over, the plaintiff might then have the right to be paid along with other creditors. But in that event other creditors may object and put in issue
183 plaintiff's right to even then participate. That question I am not deciding at present. I am deciding this case only in respect to the parties who are now before the court.

I cannot see, however valid your argument might be on the merits, how this court can escape the conclusion that this whole matter has been litigated and stands res judicata in this court at this time. Therefore, as I stated awhile ago, it seems to be utterly useless that I should read your authorities.

Gentlemen, you may prepare a decree along the lines suggested by the Court.

It seems proper that I should now make up the record for you.

Plaintiff's claim as such is not really denied by the answers in the case. It is admitted that you paid the amount alleged, and that being admitted, it follows that your claim is an allowable claim to be paid under conditions out of the assets of the bank. It should be paid by the Receiver if any funds are ever available. Defendants set up as a defense that this matter is res judicata and that plaintiff, as the result of the situation of the parties, is not entitled to share in the funds. It seems to me these are equitable matters properly triable in a court of equity and I shall so treat it and order it tried upon the equity side of the court, and plaintiff may have an exception.

If my view is correct, without motions or special findings one way or the other, plaintiff will be entitled to a review of the facts. If counsel feel the Circuit Court might regard it as a law action, notwithstanding, you may make a record by moving the court for a judgment in your favor, and that would raise the question.

Mr. Moreton: I take it the record is sufficiently protected to review the facts by your Honor's ruling directing it to be transferred to the equity side.

The Court: I think the Circuit Court will consider it from the equity side, although I may be mistaken.

Mr. Moreton: If it should not, perhaps I better make the motion your Honor suggents. I will make such a motion as your Honor has suggested.

184 The Court: You move the court for a judgment in your favor?

Mr. Moreton: Yes, your Honor.

The Court: That motion will be denied and you may have your exception. And your motions to strike will be denied.

Now, were there any other matters? Does that clear the record?

Mr. Moreton: I believe it does.

Mr. Ray: I think it does.

Mr. Jensen: I think it does.

The Court: You may have an exception to the order of the court denying your motions to strike.

Mr. Moreton: Yes, your Honor.

Filed in United States District Court, District of Utah, Mar. 25, 1926. John W. Christy, Clerk, By W. B. Wilson, Deputy.

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185 Stipulation Approving Condensed Statement of Evidence.

It Is Hereby Stipulated And Agreed, by and between the parties to the above entitled action, acting through their respective solicitors, that the foregoing condensed statement of the evidence taken at the trial of the said cause, as prepared by the plaintiff, National Surety Company herein, is in all respects true, complete and properly prepared and contains a correct condensed statement of all the evidence, both oral and documentary, given in said cause, and that the same may be settled, allowed, approved and signed by the Judge of the above entitled Court, and that when so approved and signed it shall be filed with the Clerk of said Court and shall become part of the record on appeal in said action.

A. E. MORETON,
Attorney for Plaintiff, National Surety Company.

BAGLEY, JUDD & RAY
Attorneys for Defendant Edward E. Jenkins, Receiver of National City Bank.

CHENEY, JENSEN, MARTINEAU & STEPHENS
Attorneys for Defendants American Surety Company and E. J. Groesbeck.

Dated: March 24th, 1926.

Filed in United States District Court, District of Utah, Mar. 25, 1926, John W. Christy, Clerk, By W. B. Wilson, Deputy.

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186 Order Settling Condensed Statement of Evidence.

The matter of the settlement of the Condensed Statement of the Evidence in said cause as prepared by the plaintiff National Surety Company, a corporation, and lodged in the office of the Clerk of said Court on March 24th, 1926, coming on regularly to be heard on this 25th day of March, 1926, and it appearing to the Court that each and all of the parties

of this action have filed herein their written sitpulation that the said Condensed Statement of Evidence as prepared by the plaintiff National Surety Company, is in all respects true, complete and properly prepared and contains a correct condensed statement of all the evidence, both oral and documentary, given in said cause, and the Court being fully advised in the premises.

It Is Hereby Ordered that the Condensed Statement of the Evidence in said cause, as prepared by the said plaintiff National Surety Company, and lodged in the office of the Clerk of this Court on March 24th, 1926, be and the same is hereby settled, allowed and approved as the Condensed Statement of the Evidence in said cause of said plaintiff National Surety Company, a corporation, and is hereby made a part of the record on appeal in said action.

Dated this 25 day of March, 1926.

TILLMAN D. JOHNSON,
District Judge.

Filed in United States District Court, District of Utah, Mar. 25, 1926, John W. Christy, Clerk, By W. B. Wilson, Deputy.

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187 Stipulation Waiving Bond on Appeal.

It Is Hereby Stipulated And Agreed, by and between the solicitors for the respective parties to the above entitled action, that a cost-bond on appeal on the part of the appellant herein, to-wit, National Surety Company, a corporation, is hereby expressly waived.

Dated March 24, 1926.

A. E. MORETON
Attorney for Plaintiff
National Surety Company.

BAGLEY, JUDD & RAY
Attorneys for Defendant
Edward E. Jenkins, Receiver of
National City Bank.

CHENEY, JENSEN, MARTINEAU & STEPHENS
Attorneys for Defendants
American Surety Company and
E. J. Groesbeck.

Filed in United States District Court, District of Utah, Mar. 25, 1926. John W. Christy, Clerk, By W. B. Wilson, Deputy.

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188 Petition of National Surety Company For Appeal.

To the Honorable Tillman D. Johnson, United States District Judge for the District of Utah:

The above named plaintiff, National Surety Company, feeling itself aggrieved by the decree made and entered in this cause on the 31st day of December, 1925, does hereby appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings, and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Paul, Minnesota.

And your petitioner further prays that the proper order touching the security to be required of it to protect its appeal be made.

Dated March 26, 1926.

A. E. MORETON,
Attorney for Plaintiff National Surety Company.

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189 Received copy of the foregoing Petition on Appeal and due service thereof acknowleged this 26 day of March, 1926.

BAGLEY, JUDD & RAY,
Attorneys for Defendant Edward E. Jenkins, Receiver of National City Bank.

CHENEY, JENSEN, MARTINEAU & STEPHENS
Attorneys for Defendants American Surety Company and E. J. Groesbeck.

Filed in United States District Court District of Utah Mar. 26, 1926, John W. Christy, Clerk. By W. B. Wilson, Deputy.

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190 Order Allowing Appeal.

Pursuant to the stipulation of the parties herein, It Is Hereby Ordered that a cost-bond on appeal on the part of the appellant National Surety Company, a corporation, is hereby expressly waived, and the appeal of said appellant is hereby allowed this 26 day of March, 1926.

TILLMAN D. JOHNSON
United States District Judge.

Filed in United States District Court District of Utah Mar. 26, 1926, John W. Christy, Clerk, By W. B. Wilson, Deputy.

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191 Assignments of Error.

(Filed in U. S. District Court on March 26, 1926.)

Comes now the National Surety Company, a corporation, the plaintiff above named, and says that the decree entered in the above entitled cause on the 31st day of December, 1925, is erroneous and unjust to the above plaintiff, and assigns the following errors upon which it will rely for a reversal of said decree, to-wit:

1. That the Court erred in its decree herein in fixing any limitations, qualifications or conditions upon the allowance of plaintiff's claim herein sued upon, and should have allowed the same without qualification or limitations thereon; for the reason that the claim herein sued upon is a valid and outstanding obligation of the National City Bank, created by express contract with the said bank, and therefore it should have been ordered and decreed by the Court, not only that said claim should be allowed and approved, but that the defendant receiver should be directed to pay to the plaintiff dividends thereon upon the same basis as paid to other common creditors of the said bank, for the reason that the undisputed evidence herein shows that on the 3rd day of

192 January, 1921, the plaintiff National Surety Company, upon the request and application of the National City Bank, executed and delivered to Edward J. Groesbeck as County Treasurer of Salt Lake County, its certain bond in the sum of $125,000.00; that as the inducement and consideration for the execution of said bond, the National City Bank made, executed and delivered to the plaintiff National Surety Company its certain Indemnity Agreement, of date December 22, 1920, wherein and whereby it agreed to indemnify the plaintiff National Surety Company and save it harmless

from all claims or demands whatsoever on account of its execution of the said bond; and in said Indemnity Agreement plaintiff was given the right to look to and rely upon the property of said National City Bank and its income and earnings, and to follow and recover out of the bank's property, for anything that might become due to the plaintiff under said Indemnity Agreement; that the said National City Bank failed and this plaintiff was obliged to and did pay to Salt Lake County and Edward J. Groesbeck, its Treasurer, the sum of $125,000.00 and that by reason thereof the said National City Bank became indebted to the plaintiff in the sum of $125,000.00; and that plaintiff duly filed with said defendant Receiver its claim herein in the sum of $120,000.00. ($5000.00 of its claim having been assigned to the American Indemnity Company); and that therefore the Court should not only have made its order herein allowing and approving said claim, but also its order directing the defendant Receiver to pay to the plaintiff dividends upon said sum of $125,000.00 upon the same basis as paid to other common creditors of said bank.

2. That the Court erred in making its decree herein ordering, adjudging and decreeing: "(a) That the National Surety Company, plaintiff, shall have and recover nothing from the defendant Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, until and after such time as the said Jenkins, Receiver, shall have paid to the American Surety Company or until the American Surety Company shall have received out of the assets of said bank,
including the proceeds from the $360,000.00 par value
193 of Crystal Lake Farms Company bonds, the sum of
$223,362.15, together with interest at the rate of 8 per cent per annum on the sum of $200,000.00 from the 29th day of February, 1924, all as provided in that certain decree of June 10, 1924, hereinbefore referred to," for the reason that such portion of the said decree is contrary to and against law and no such limitation or qualification upon the payment of plaintiff's claim herein should have been made, and that such qualification or limitation is inconsistent with the allowance and approval of the claim itself and absolutely nullifies that portion of the decree herein allowing and approving as a just and valid claim against said Receiver of said National City Bank, plaintiff's claim herein sued upon.

3. That the Court erred in making its decree herein ordering, adjudging and decreeing: "(b) That the allowance of the National Surety Company's claim herein sued upon, shall

not affect the present basis of computing and paying dividends as now established by the receiver upon claims heretofore approved," for the reason that such portion of the said decree is contrary to and against law and no such limitation or qualification upon the payment of plaintiff's claim herein should have been made, and that such qualification or limitation is inconsistent with the allowance and approval of the claim itself and absolutely nullifies that portion of the decree herein allowing and approving as a just and valid claim against said Receiver of said National City Bank, plaintiff's claim herein sued upon.

4. That the Court erred in making its decree herein ordering, adjudging and decreeing: "(c) That the Receiver shall not set up the claim of the National Surety Company herein sued upon on his books as an approved claim upon which dividends are to be paid, nor shall he set aside any funds or assets for the payment of dividends thereon, nor shall he pay any dividends thereon, and plaintiff's claim to share at this time in dividends upon said claim, is denied," for the reason that such portion of the said decree is contrary to and against law and no such limitation or qualifica-
194 tions upon the payment of plaintiff's claim herein should have been made, and that such qualification or limitation is inconsistent with the allowance and approval of the claim itself and absolutely nullifies that portion of the decree herein allowing and approving as a just and valid claim against said Receiver of said National City Bank, plaintiff's claim herein sued upon.

5. That the Court erred in its decree herein in finding and decreeing "That the subject matter of this action has heretofore been fully determined and adjudicated by decree of this Court made and entered on the 10th day of June, 1924, in case No. 8069, entitled 'Salt Lake County, a subdivision of the State of Utah, E. J. Groesbeck, County Treasurer of said Salt Lake County, and American Surety Company of New York, a corporation, plaintiffs, vs. Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, a national banking association, defendant, National Surety Company of New York, a corporation, American Indemnity Company, a corporation, and Massachusetts Bonding & Insurance Company, a corporation, Interpleaded Defendants,' " for the reason that the undisputed evidence shows; —that said action was one in rem and involved only the respective rights of the American Surety Company and the National Surety Company in and to dividends to be paid by the

defendant Receiver on the said deposit of public moneys, in which action this plaintiff was required by order of the Court to appear and set forth its claim to subrogation to said dividends, and that in said action no issue was joined or tried between this plaintiff National Surety Company and said defendant Receiver upon the right of this plaintiff to have its claim against said Receiver arising out of the Indemnity Agreement herein sued upon, allowed and approved and the Receiver directed to pay dividends thereof; that the undisputed evidence shows that in said action no claim was made or asserted at the trial thereof by this plaintiff for judgment against said Receiver arising out of said Indemnity Agreement, and that said action at the outset thereof resolved itself into and was recognized by all the parties thereto,

as purely a contest between said surety companies as
195 to their respective rights to priority by subrogation in
and to dividends to be paid upon said deposit; that the question here involved of plaintiff's right to recover against the Receiver of said bank directly upon said express contract of indemnity, was not decided nor even mentioned in the decree of the trial court nor in the opinion of the United States Circuit Court of Appeals for the Eighth Circuit, affirming said decree, in said other action, said decision and decree being based entirely upon a consideration of the respective equitable rights of the respective surety companies to succeed by subrogation to the rights of Salt Lake County and E. J. Groesbeck, its Treasurer, in and to the dividend then declared and in the hands of the Receiver upon the said deposit of public funds, and in and to dividends thereafter to be declared by him upon said deposit. That the case at bar is an action at law founded upon the express obligation and contract of the National City Bank, arising out of the written Indemnity Agreement made and executed by said bank to the plaintiff as the inducement and consideration for the execution of plaintiff's bond in behalf of said Bank to E. J. Groesbeck, Treasurer of Salt Lake County, guaranteeing the repayment to him of all moneys deposited by him as such Treasurer in said Bank up to the amount of the penalty of said bond, and the obligation resulting therefrom from said National City Bank to this plaintiff by reason of the failure of said Bank and the payment by the plaintiff to Edward J. Groesbeck as Treasurer of the penalty of said bond in the sum of $125,000.00, claim for which amount plaintiff presented to the defendant Receiver of said Bank and brought the present action to require the said defendant Receiver to allow and approve said claim and to pay to plaintiff dividends thereon, upon the same basis as paid to other creditors of said Bank.

That the Court erred in making said finding for the reason that it failed to distinguish between plaintiff's right to subrogation to the dividends or fund involved in said other action, and plaintiff's rights herein based solely and directly upon its written contract of indemnity with said bank, and the obligation arising out of the same, which right is a distinct,
196 sepaarte and independent matter and cause of action from plaintiff's right to share by subrogation in and to the dividend in controversy in said other action, and which cause of action has never been adjudicated between plaintiff and said defendant Receiver, neither party having had their day in Court thereon.

6. That the Court erred in making its orders, of date October 17, 1925, interpleading the American Surety Company of New York, a corporation, and E. J. Groesbeck, as defendants herein, and in requiring them to "appear in this action and set forth their claims, if any, to the property subject of said action," for the reason that plaintiff seeks herein to recover upon a written Indemnity Agreement executed by the National City Bank as the inducement and consideration to the plaintiff for the execution of a certain depository bond in behalf of said Bank, and in favor of E. J. Groesbeck, as Treasurer of Salt Lake County, Utah, under which bond this plaintiff was obliged to pay the penalty thereof to E. J. Groesbeck as Treasurer of Salt Lake County, and to Salt Lake County, Utah, in the sum of $125,000.00. That plaintiff filed a claim with the defendant Receiver of said bank in said amount on account of said Indemnity Agreement and requested that the same be allowed and approved and that dividends be paid to it upon the same basis as to all other common creditors of said bank; and that therefore the said American Surety Company and the said E. J. Groesbeck had no interest whatsoever in the subject matter of this action and therefore were not proper parties defendant.

7. That the Court erred in denying the Motion of the plaintiff National Surety Company to strike from the answer of the defendant Receiver the following portions of said answer, to-wit: Paragraphs 23, 24 and 25 thereof; for the reason that the matters and things therein set forth were and are immaterial, sham, frivolous and argumentative and do not constitute any defense to plaintiff' cause of action herein sued upon. (Condensed Statement 114).

8. That the Court erred in denying the Motion of the Plaintiff National Surety Company to strike from the Amended

Answer of the defendants American Surety Company
197 and E. J. Groesbeck that portion thereof beginning on
the eleventh line from the bottom of page five thereof with the words: "That the dividends already paid" and ending with the conclusion of said paragraph, for the reason that the matters and things therein set forth were and are immaterial, sham, frivolous and argumentative and do not constitute any defense to plaintiff's cause of action herein sued upon. (Condensed Statement 114).

9. That the Court erred in making its order on December 3rd, 1925, transferring this action from the law side to the equity side of the Court and in treating and considering this action as one in equity rather than as one at law, for the reason that plaintiff seeks herein to recover upon a written Indemnity Agreement executed by the National City Bank as the inducement and consideration to the plaintiff for the execution of a certain depository bond in behalf of said Bank, and in favor of E. J. Groesbeck, as Treasurer of Salt Lake County, Utah, under which bond this plaintiff was obliged to pay the penalty thereof to E. J. Groesbeck as Treasurer of Salt Lake County, and to Salt Lake County, Utah, in the sum of $125,000.00, and that said action is therefore one at law. (Condensed Statement 113).

10. That the Court erred in denying the Motion of the plaintiff National Surety Company herein for a judgment in its favor, the reason that the undisputed evidence herein shows that the plaintiff National Surety Company has a just and valid claim against said Receiver for the sum of $125,000.00, arising out of express contract, which claim the Court not only should have allowed and approved, but also should have directed the defendant Receiver of said Bank to pay to the plaintiff dividends thereon upon the same basis as paid to other common creditors of said bank.

11. That the Court erred in not finding, as pleaded in the Amendment to plaintiff's Reply to the Answer of the defendant Receiver, and as shown by the undisputed evidence herein, that the National City Bank, having accepted the benefit derived from the surety bond furnished by this plaintiff in
198 its behalf, and the said interpleaded defendants American Surety Company and E. J. Groesbeck having received and accepted the benefits derived from the said surety bond so furnished, and the payment thereunder of the sum of $125,000.00, cannot escape from the obligation assumed by said bank in securing said bond, to-wit, to reimburse the plain-

tiff for any loss it might sustain thereunder, and that the said defendants and each of them are, by reason thereof, barred and estopped from asserting and claiming that the claim of the plaintiff herein sued upon, founded upon said obligation, should not be allowed and approved and dividends thereon be paid to it upon the same basis as to other common creditors of the bank.

12. That the Court erred in admitting in evidence, over the objection and exception of plaintiff National Surety Company, the eighth Assignment of Error of the appellant National Surety Company, from Exhibit 3 (Transcript of the Record in said other action), which appears at pages 126 to 128 thereof, for the reason that the same is immaterial, irrelevant and not within the issues of this case, and that the question of res judicata should be determined from the pleadings and the decree in said other action, and that it is unfair to pick out from the eighteen Assignments of Error in said other action, said Eighth Assignment of Error. (Condensed Statement 61).

13. That the Court erred in admitting in evidence, over the objection and exception of plaintiff National Surety Company, those portions of Exhibit 10, same being plaintiff's brief in said other action in the United States Circuit Court of Appeals, shown and designated at pages 63 to 67 of the Condensed Statement of the Evidence herein, and each of said portions thereof, for the reason that the same is immaterial and irrelevant and that the question of res judicata should be determined by the pleadings in said other action and the decree therein, and that it is unfair to pick from said brief consisting of fifty-one pages, the limited portions therein offered and admitted.

14. That the Court erred in admitting in evidence, over the objection and exception of plaintiff National Surety
199 Company, those portions of Exhibit 9, same being plaintiff's Reply Brief in said other action in the United States Circuit Court of Appeals, shown and designated at pages 68 to 69 of the Condensed Statement of the Evidence herein, and each of said portions thereof, for the reason that the same is immaterial and irrelevant and that the question of res judicata should be determined by the pleadings in said other action and the decree therein, and that it is unfair to pick from said reply brief consisting of thirty-five pages, the limited portions therein offered and admitted.

15. That the Court erred in permitting the defendant Edward E. Jenkins, Receiver, over the objection of the plaintiff National Surety Company, to answer the following question asked of him and to reply as follows, for the reason that the same is immaterial and does not constitute a defense:

Q. So, in order for you to pay fifteen per cent additional, you have to realize from the assets some $237,000 or $240,000?
A. At fifteen per cent, yes.

To this ruling plaintiff National Surety Company duly excepted. (Condensed Statement 16.)

16. That the Court erred in permitting the defendant Ed-J. Jenkins, Receiver, over the objection of the plaintiff National Surety Company, to answer the following question asked of him and to reply as follows, for the reason that the same is immaterial and does not constitute a defense:

Q. Referring again to paragraph 25, on the top of page 10, you set forth in your complaint it will require the sum of $85,000 and some additional to pay the fifteen percent dividend on account of the Groesbeck certificate, is that correct?
A. Yes.
To this ruling plaintiff National Surety Company duly excepted. (Condensed Statement 16½)

17. That the Court erred in permitting the defendant Edward E. Jenkins, Receiver, over the objection of the plaintiff National Surety Company, to answer the following question asked of him, and to reply as follows, for the reason that the same is immaterial:

Q. Let me ask you this question, Mr. Jenkins, if you were required at this time to pay the National Surety Company and Massachusetts Bonding & Insurance Company as general creditors, as claimed in this suit, you would have to pay them sixty percent at once, wouldn't you, to have them paid equally with other creditors? A. Yes.

To this ruling plaintiff National Surety Company duly excepted. (Condensed Statement 17.)

18. That the Court erred in permitting the defendant Edward E. Jenkins, Receiver, over the objection of the plaintiff National Surety Company, to answer the following question asked of him, and to reply as follows:

Q. Referring particularly to the Treasurer of Salt Lake County and the American Surety Company as creditors, and

having in mind, Mr. Jenkins, that they have had in addition to your dividends, $150,000 from the depository sureties, would you be able to pay them out in full in the event you were required to pay sixty per cent to the National Surety Company and the Massachusetts Bonding Company?

Mr. Moreton: Object to that as immaterial and irrelevant, not within the issues and not constituting a defense and being a question that should not be raised here by the Receiver. Seems to me it is no interest of his how many claims are allowed, so long as they are just claims.

A. No.

To this ruling plaintiff National Surety Company duly excepted. (Condensed Statement 17).

19. That the Court erred in admitting, over the objection and exception of the plaintiff National Surety Company, Exhibit 7, same being the application of Treasurer E. J. Groesbeck to the American Surety Company for his official bond in the sum of $200,000.00, for the reason that the same
201 was incompetent, irrelevant and immaterial and not within the issues, not being pleaded and forming no proper defense or any defense, no objection, however, being made thereto because same is a copy. (Condensed Statement 53).

20. That the Court erred in permitting the witness, W. E. McKell over the objection of the plaintiff National Surety Company, to answer the following question asked of him and to reply as follows, for the reason that the same is incompetent, immaterial and not within the issues:

Q. Now, Mr. McKell, will you state to the Court whether or not Mr. Groesbeck has paid anything to the American Surety Company on account of the payment of $223,000 odd dollars which it made to Salt Lake County as the result of the failure of the bank as his official surety?

A. Mr. Groesbeck has made no payment to the American Surety Company.

To this ruliug plaintiff National Surety Company duly excepted. (Condensed Statement 57).

21. That the Court erred in permitting the defendant Edward E. Jenkins, Receiver, over the objection of the plaintiff National Surety Company, to answer the following question asked of him and to reply as follows:

Q. What percentage do you think you would be able to pay to the common creditors of the bank if the claims of the National Surety Company and the Massachusetts Bonding Company were added to the list of claims?

Mr. Moreton: I object to it as immaterial, irrelevant and incompetent. If these claims are to be allowed, it matters not how much would be paid to the creditors of the bank; this claim, I take it, should stand on its own merits.

The Court: You may answer.

Mr. Moreton: Save an exception.

202 A. If the sixty per cent were paid on the $150,000.00 of these two bonding companies, that would take $90,000.00 immediately away from us. It would take $90,000.00 to let them catch up with the rest. That would leave about seven per cent to be paid on the spread over the whole obligation, instead of fifteen per cent. The others who have claims against the bank which have been allowed, would receive sixty-seven per cent instead of seventy-five per cent. (Condensed Statement 84).

Wherefore, plaintiff National Surety Company prays that said decree be reversed or modified and that the United States District Court for Utah be directed to enter its judgment and decree ordering, adjudging and decreeing that the claim of the National Surety Company against said defendant Edward E. Jenkins as Receiver, in the sum of $120,000.00, should be allowed and approved without qualification or limitation thereon, and that the said defendant Receiver be directed to pay to it dividends thereon upon the same basis as have been and will be paid to all other common creditors of the bank; that is to say, sixty per cent immediately and its pro rata portion of all dividends to be hereafter paid by said Receiver; and for such other and further relief as to the Court may appear just and equitable.

A. E. MORETON,
Solicitor for Plaintiff
National Surety Company.

Copy of the foregoing Assignments of Error received this 26 day of March, 1926.

BAGLEY, JUDD & RAY,
Solicitors for Defendant
Edward E. Jenkins, Receiver.

CHENEY, JENSEN, MARTINEAU & STEPHENS,
Solicitors for Interpleaded Defendants American Surety Company and E. J. Groesbeck.

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203 Citation on Appeal of National Surety Company.

In the United States District Court, in and for the District of Utah Central Division.

National Surety Company, a corporation, Plaintiff,
#8851. vs. Equity. (Law)
Edward E. Jenkins, Receiver of the National City Bank, Defendant,
American Surety Company, a corporation, and E. J. Groesbeck, Interpleaded Defendants.

United States of America To Edward E. Jenkins as Receiver of the National City Bank of Salt Lake City, Utah, a National Banking Association, defendant above named, and to American Surety Company, a corporation, and E. J. Groesbeck, County Treasurer of Salt Lake County, interpleaded as defendants—Greetings:

You and each of you are hereby notified that in a certain case in equity in the United States District Court, in and for the District of Utah, Central Division, wherein National Surety Company, a corporation, is plaintiff and Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City is defendant, and the American Surety Company, a corporation, and E. J. Groesbeck, County Treasurer of Salt Lake County, are interpleaded as defendants, an appeal has been allowed the plaintiff National Surety Company, a corporation, therein from the decree entered in said cause by said Court on December 31st, 1925, to the United States Circuit Court of Appeals for the Eighth Circuit. You and each of you are hereby cited and admonished to be and appear in said court at St. Paul, Minnesota, sixty days after the date of this citation to show cause, if any there be, why the

order and decree appealed from should not be correct-
204 ed and speedy justice done between the parties in that behalf.

Dated this 26 day of March, 1926.

TILLMAN D. JOHNSON,
United States District Judge for the District of Utah.

A True Copy.

Teste: John W. Christy,
Clerk U. S. Court, Dist. of Utah,
By W. B. Wilson, Deputy.

Seal
U. S. Dist. Court,
District of Utah.

Received copy of the foregoing Citation on Appeal and due service thereof acknowledged this 26th day of March, 1926.

BAGLEY, JUDD & RAY,
Attorneys for Defendant Edward E. Jenkins, Receiver of National City Bank.

CHENEY, JENSEN, MARTINEAU & STEPHENS,
Attorneys for Defendants American Surety Company and E. J. Groesbeck.

Filed in United States District Court, District of Utah. March 26, 1926. John W. Christy, Clerk, By W. B. Wilson, Deputy.

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205 (Stipulation as to Contents of Transcript.)

It is Hereby Stipulated and Agreed, by and between the undersigned solicitors for the respective parties to the above entitled action, that the Clerk of the above entitled Court, in making up the Transcript on Appeal in said cause, shall include therein the following papers and records:

Date Filed or Entered	
April 28, 1925	Complaint.
June 2, 1925	Demurrer of defendant Edward E. Jenkins, Receiver.
September 28, 1925	Order overruling demurrer.
October 15, 1925	Answer of defendant Edward E. Jenkins, Receiver.
October 17, 1925	Order interpleading American Surety Company and E. J. Groesbeck as defendants.
December 2, 1925	Amended Answer of Interpleaded defendants E. J. Groesbeck and American Surety Company.
December 2, 1925	Plaintiff's reply to answer of defendant Edward E. Jenkins.
December 2, 1925	Plaintiff's Motion to Strike from Answer of interpleaded defendants E. J. Groesbeck and American Surety Company.
December 2, 1925	Plaintiff's Motion to Strike from Answer of defendant Receiver.
December 2, 1925	Plaintiff's reply to Answer of interpleaded defendants American Surety Company and E. J. Groesbeck.
December 2, 1925	Minute order of Court.
December 3, 1925	Amendment to plaintiff's reply to Answer of Defendant Edward E. Jenkins, Receiver.
December 3, 1925	Minute order of Court.
December 31, 1925	Decree of Court.
206 January 16, 1926	Order of Court signed giving plaintiff and appellant National Surety Company to and including March 15th, 1926, within which to serve and file its Condensed Statement of the Evidence.
March 13, 1926	Order of Court signed giving plaintiff and appellant National Surety Company to and including April 5th, 1926, within which to serve and file its Condensed Statement of the Evidence.
March 24, 1926	Condensed Statement of Evidence lodged in Clerk's Office.
March 24, 1926	Stipulation of parties approving Condensed Statement of the Evidence.

March	25, 1926	Order settling Condensed Statement of Evidence.
March	25, 1926	Stipulation waiving bond on part of appellant National Surety Company.
March	26, 1926	Petition for Appeal of appellant National Surety Company.
March	26, 1926	Order allowing appeal of appellant National Surety Company.
March	26, 1926	Assignments of Error of plaintiff and appellant National Surety Company.
March	26, 1926	Citation on Appeal of appellant National Surety Company lodged in Clerk's Office.
March	26, 1926	Praecipe for Transcript on Appeal.

It is further stipulated and agreed that any papers and records in said cause which are not in this stipulation above specified, may be omitted by said Clerk from said Transcript on Appeal.

It is further agreed that this stipulation shall be taken and construed as the Praecipe of each of the respective parties to this action.

Dated March 26, 1926.

A. E. MORETON,
Solicitor for Plaintiff
National Surety Company.

BAGLEY, JUDD & RAY,
Solicitors for Defendant
Edward E. Jenkins, Receiver.

CHENEY, JENSEN, MARTINEAU & STEPHENS,
Solicitors for Interpleaded Defendants American Surety Company and E. J. Groesbeck.

Filed in United States District Court, District of Utah, Mar. 26, 1926. John W. Christy, Clerk, By W. B. Wilson, Deputy.

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207 Certificate of Clerk.

United States of America,
District of Utah—ss.

I, John W. Christy, Clerk of the District Court of the United States for the District of Utah, do hereby certify that

the foregoing pages numbered from one to 208, both included, contain a full, true, correct and complete copy and transcript of the record, papers and proceedings designated in the praecipe for transcript of the record in that certain suit wherein National Surety Company, a corporation, is plaintiff and Edward E. Jenkins, Receiver of the National City Bank is defendant, and American Surety Company, a corporation, and E. J. Groesbeck are interpleaded defendants, numbered 8851, in equity (Law) on the dockets of said Court as full, true, correct and complete as the originals thereof after comparisons with the said originals by me, now remain of record and on file in my office omitting the following papers and proceedings not specified in said praecipe, to-wit:

May 25, 1925, Summons and return.
May 16, 1925, Order time to plead extended to June, 1925.
Sept. 5, 1925, Order for hearing demurrer to complaint set for September 26, 1925.
Sept. 26, 1925, Order continuing hearing to September 28, 1926.
Oct. 28, 1925, Order Court served, filed on return.
Nov. 5, 1925, Answer Groesbeck et al filed.
Nov. 28, 1925, Order set for trial December 2, 1925.

I further certify that the original citation in this cause
208 is hereunto annexed and transmitted herewith.

Seal
U. S. Dist. Court,
District of Utah.

In Witness Whereof I have hereunto subscribed my name and affixed the seal of said Court at Salt Lake City, in said district this 26th day of March, in the year of our Lord nineteen hundred and twenty-six and the one hundred and fiftieth year of the Independence of the United States of America.

JOHN W. CHRISTY, Clerk,
United States District Court,
District of Utah.
By W. B. Wilson, Deputy.

Filed Mar. 30, 1926. E. E. Koch, Clerk.

Appearances of counsel omitted in printing.

Minute entry of argument and submission June 16, 1926, omitted in printing.

In United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1926

No. 7409

National Surety Company, a Corporation, Appellant,

vs.

Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, Utah, etal., Appellees

Appeal from the District Court of the United States for the District of Utah

Mr. Arthur E. Moreton, for appellant.

Mr. Paul H. Ray (Mr. E. M. Bagley and Mr. Robert L. Judd were with him on the brief), for appellee, Edward E. Jenkins, Receiver.

Mr. John Jensen (Mr. A. M. Cheney, Mr. L. R. Martineau, Jr., and Mr. Harold M. Stephens were with him on the brief), for appellees, American Surety Company and E. J. Groesbeck.

Before Booth, Circuit Judge, and Phillips and John B. Sanborn, District Judges

Opinion—Filed March 28, 1927

Phillips, District Judge, delivered the opinion of the court.

The National Surety Company brought this action against Edward E. Jenkins, as Receiver of The National City Bank of Salt Lake City, Utah, to compel the allowance of its claim upon an indemnity agreement entered into between the bank and the National Company and the pay-

ment of dividends thereon. The receiver answered and prayed that the American Surety Company and E. J. Groesbeck be required to interplead in the action. The court entered an order directing that Groesbeck and the American Company appear in the action and set forth their claims, if any, to the assets out of which the National Company sought the payment of dividends. Thereupon, Groesbeck and the American Company filed their answer. The answers of the receiver, the American Company and Groesbeck set up the decree in the case of Salt Lake County, et al. v. Jenkins, et al., (C. C. A. 8) 5 F. (2d) 34, and alleged that under the doctrine of res adjudicata the National Company was estopped from asserting its alleged claim upon the contract of indemnity and from receiving dividends thereon out of the assets of the insolvent bank. These answers also alleged that the National Company was not entitled to participate in such dividends until the American Company had been paid in full under its right of subrogation to the claim of Salt Lake County.

The facts material to the determination of the questions here involved are these:

Groesbeck was the County Treasurer of Salt Lake County, Utah. On the 3rd day of January, 1921, Groesbeck as principal, and the American Company as surety, executed and delivered to Salt Lake County an official fidelity bond in the sum of $200,000. Groesbeck deposited funds which came into his hands as County Treasurer with the bank. To secure such deposit, the bank, as principal, executed and delivered to Groesbeck three surety bonds, one executed by the National Company as surety, in the sum of $125,000, one by the Fidelity & Deposit Company as surety, in the sum of $75,000, and one by the Massachusetts Bonding and Insurance Company, as surety, in the sum of $25,000. These bonds ran to Groesbeck, Treasurer of Salt Lake County, Utah, as obligee. The bank also deposited with Groesbeck, as collateral security to further secure such deposit, Crystal Lake Farm Company bonds of the par value of $360,000. The bank, in its application to the National Company for the bond executed by it as surety, agreed to indemnify the National Company for all losses it might suffer by reason of its liability as surety under such bond. After the payment by the National Company of its liability under such bond, it assigned to the American In-

demnity Company $5,000 of its claim upon such contract of indemnity.

The bank failed January 17, 1922. At that time, the treasurer's deposit with the bank amounted to $643,094.29. Salt Lake County was paid in full as follows: By the National Company $125,000, by the Massachusetts Company $25,000, by the Fidelity Company $75,000, by the American Company $200,000, and by two dividends paid by the receiver on the deposit of Groesbeck as Treasurer. The first dividend amounted to $170,428.28. The second dividend amounted to $56,809.42. At the time the second dividend was paid, the balance due the county was $47,666.01, leaving an overplus of $9,143.41.

On March 10, 1924, Salt Lake County, Groesbeck as Treasurer, and the American Company brought an action against the receiver, in which they sought a decree directing the receiver to pay out of the second dividend $47,666.01 to Salt Lake County, and the balance of $9,143.41 and all future dividends to accrue on the deposit of Groesbeck, as Treasurer, and the proceeds of the Crystal Lake bonds to the American Company. The plaintiff in that suit asserted that the American Company was subrogated to the rights of Salt Lake County and Groesbeck as Treasurer. The receiver answered setting up that the National Company and Massachusetts Company had paid the sums of $125,000 and $25,000, respectively, on account of the depository bonds executed by them as sureties, and were claiming that they were subrogated to the rights of Groesbeck and the County, and were entitled to the excess of the second dividend and the future dividends to be paid on account of such deposit, and the proceeds of the Crystal Lake bonds, and prayed that they be required to interplead in the action. On March 28, 1924, the court entered its order directing the receiver to pay the sum of $56,809.42, the amount of the second dividend, into the registry of the court to abide the orders and direction of the court, and ordered the National Company and the Massachusetts Company to interplead in the action, and to show cause, if any they had, why the money and the funds claimed by the plaintiffs in such action should not forthwith be paid to such plaintiffs.

The National Company appeared and filed its answer. It set up its claim to subrogation, and also set up the indemnity

agreement, and the fact that it had duly presented its claim thereon to the receiver. The National Company prayed that it be decreed to be entitled to subrogation to its pro rata share of said $9,143.41, and to its pro rata share of all dividends thereafter to be declared by the receiver by reason of the deposit of Groesbeck, as treasurer, and to its pro rata share of the Crystal Lake bonds. It also prayed that the claim of the National Company against the receiver in the sum of $125,000 arising out of such indemnity agreement be allowed and approved, and that the receiver be ordered to pay the National Company dividends thereon. The receiver filed no pleading in response to the answer of the National Company. The American Company filed an answer thereto in which it denied the right of the National Company to subrogation, and also alleged that it had no knowledge or information sufficient to form a belief as to the truth of the allegations relative to the indemnity agreement, and therefore denied the same. The former cause duly came on for trial. At the commencement of the trial a stipulation was entered into between counsel by which it was agreed that the balance due Salt Lake County should be paid out of the fund, and an order was entered directing that such payment be made. Counsel for the American Company and the County thereupon announced that the litigation as it then stood was wholly between the American Company on the one side, and the Massachusetts Company and the National Company on the other side, as to which was entitled to the prior right of subrogation to the balance of the second dividend, to the future dividends to be paid on the deposit of Groesbeck, as Treasurer, and to the Crystal Lake bonds. That was the sole issue tried by the court and determined and adjudicated by its decree. That was the sole issue considered by this court on the appeal of the cause. See National Surety Co. v. Salt Lake County, 5 F. (2d) 34, where District Judge Faris, speaking for the court, said:

"These cases involve the question of appellants' (National Surety Company and American Indemnity Company) right to share, by way of subrogation, in certain dividends in the hands of one Jenkins, and accruing from assets, which came into the hands of Jenkins, as receiver of the National City Bank of Salt Lake City, Utah, which failed

on the 17th day of January, 1922; as also the right of appellants to participate in the proceeds of certain securities in the hands of one Groesbeck.

* * * * * * *

"The single question is whether, upon the facts stated, the law and the equities give these remaining dividends and the proceeds of the Crystal Lake Farms bonds, after the county has been paid in full, to the appellant National Surety Company or to the appellee, American Surety Company."

The instant case duly came on for trial. The trial court held that the decree in the former case was res adjudicata of the right of the National Company to share in dividends until the American Company had been paid in full. It allowed the claim of the National Company, but decreed that it should receive no dividends thereon until the American Company had been paid in full.

The first question presented is whether the decree in the former suit is a bar, under the doctrine of res adjudicata, to the claim and right which the National Company now asserts. In their complaint in the former suit, the American Company and Groesbeck asserted and claimed that the American Company was subrogated to the rights of Groesbeck, as Treasurer, and of Salt Lake County in the excess of the second dividend, in the future dividends, and in the Crystal Lake bonds. The order of interpleader brought the National Company in solely for the purpose of determining whether it or the American Company had the prior right of subrogation to those specific funds and bonds. When the cause came on for hearing, counsel for the American Company and the County announced that the sole question to be determined was whether the American Company or the National Company and the Massachusetts Company were entitled to the prior right of subrogation. While the indemnity agreement of the National Company was pleaded and introduced in evidence, it was upon the theory that it gave a superior equity to the National Company, and because thereof, a prior right to subrogation.

Counsel for the American Company, in a portion of their brief in the former case which was introduced in evidence in the instant case, said:

"As we understand them, the contentions of the National Surety Company are substantially as follows:

I

That the indemnity agreement of the bank, embodied in the bank's application to the National Surety Company for depository bond, gives the National Surety Company a direct legal right, not to indemnity out of the general assets of the bank as such, but to indemnity out of the dividends declared and payable upon the claim of Mr. Groesbeck. * * *

It is * * * clear upon principle, that the indemnity agreement between the Bank and the National must be treated as a separate contractual arrangement affecting only the National and the Bank. Whether it constitutes a sufficient basis for some direct claim against the Bank, is interestingly discussed by the dissenting opinion in the foregoing case of U. S. F. & G. Co. v. Carnegie Trust Company (164 N. Y. S. 92, 221 N. Y. 646), * * * Surely the National cannot because it has an agreement with the Bank for indemnity, push the Treasurer aside before he has been paid in full upon his approved claim, and step in and receive dividends on that claim, either to his exclusion or pro tanto. Certainly a surety of the Bank cannot by virtue of an indemnity agreement with the Bank alone, be entitled to share ahead of a depositor or a depositor's assignee and subrogee.

* * * * * * *

We submit that both upon principle, as a plain matter of contract, and upon the authority of the case above mentioned, there is nothing in the National's so-called indemnity agreement with the Bank that gives it any standing or any rights in the present litigation."

It is clear that the parties, the trial court, and the appellate court, were of the opinion in the former suit that the National Company's direct claim against the bank on its contract of indemnity and the right to dividends thereon were not there involved. The prior right of subrogation to the dividends on the claim of the county and to the proceeds of the Crystal Lake bonds was the sole issue litigated, the

sole question determined by the decree, and the sole question passed upon by this court on appeal. The right of the National Company, because of its contract of indemnity, to participate in the dividends payable on the deposit of Groesbeck as Treasurer was denied, but the right of the National Company to participate in dividends as a general creditor upon the contract of indemnity was neither considered nor determined.

The cause of action asserted by the National Company in the former suit was predicated upon its alleged right of subrogation. The cause of action sought to be enforced by the National Company in this case is predicated upon its contract of indemnity. It is a cause of action which is wholly independent of, and entirely separate and distinct from, the alleged cause of action asserted by the National Company in the former suit. Since the National Company seeks relief in the instant case upon a different and distinct cause of action from the one asserted by it in the former suit, the judgment in the former suit is conclusive only as to such points or questions as were actually in issue and adjudicated therein. Cromwell v. Sac County, 94 U. S. 351, 354; Water, Light & Gas Co. v. City of Hutchinson (C. C. A. 8) 160 Fed. 41, 45; United Shoe Machinery Corporation v. U. S., 258 U. S. 451, 458, 459; Owensboro v. Cumberland T. & T. Co., 230 U. S. 58, 76; 34 C. J., Sec. 1322, p. 911.

In Cromwell v. Sac County, supra, the court said:

"Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

It is true that the National Company, in its answer in the former suit, alleged the contract of indemnity, and

prayed that its claim thereon against the receiver be allowed and approved. But such claim was not a proper subject for litigation in the former suit. It was the subject of an independent suit by the National Company against the receiver. The American Company so contended in its brief on appeal in the former suit. Since it is a matter which could not properly have been litigated, and was not actually litigated, and was not necessarily determined by the decree, in the former suit, it is not concluded by that decree although it was put in issue by the pleadings. Northwestern Port Huron Co. v. Babcock (C. C. A. 8) 223 Fed. 479; Haines v. Welker & Co., 182 Ia. 431, 165 N. W. 1027; Kern v. Wilson, 82 Ia. 407, 48 N. W. 919; Brury v. Smith, 8 Kan. A. 52, 53 Pac. 74; O'Meara v. McDermott, 43 Mont. 189, 115 Pac. 912; Sweet v. Tuttle, 14 N. Y. 465; McGee v. Wineholt, 23 Wash. 748, 63 Pac. 571; American Surety Co. v. White, — Va. —, 1927 S. E. 178; 34 C. J., Sec. 1336, p. 930.

And the fact that National Company set up the indemnity agreement and upon that agreement mistakenly sought the enforcement of a right which did not exist, does not preclude it from seeking in this action, through a different remedy and upon another theory, the enforcement of a right to which it is legally entitled. Barnsdall v. Waltemeyer (C. C. A. 8) 142 Fed. 415; Water, Light & Gas Co. v. City of Hutchinson (C. C. A. 8) 160 Fed. 41, 45; Southern Pacific Co. v. Bogert, 250 U. S. 483, 490; Ash Sheep Co. v. U. S., 252 U. S. 159, 170; Boise Development Co. v. Boise City, 30 Ida. 675, 167 Pac. 1032; 34 C. J., Sec. 1232, p. 815, Sec. 1227, p. 860.

In Boise Development Co. v. Boise City supra, the court said:

"When a party, acting upon a mistaken theory as to his legal rights, brings his action, and is defeated by reason thereof, and afterwards renews the litigation, basing his claim upon a correct theory, the former judgment is no bar to the second action. Black on Judgments, Sec. 733; Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303; Freeman on Judgments (4th Ed.) Sec. 260; 23 Cyc. 1226; Keane v. Pittsburg, etc., Co. 17 Idaho 179-191, 105 Pac. 60; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773; Russell

v. Place, 94 U. S. 606, 24 L. Ed. 214; Lockett v. Lindsay, 1 Idaho 324. At most the former case was 'merely illusory and supposititious, and hence it cannot be considered as identical, in any just sense of the term, with the true cause of action correctly set up and supported by a right theory of the facts.' Black on Judgments, Sec. 733."

In Barnsdall v. Waltemeyer, supra, the court said:

"But the fatuous choice of a fancied remedy that never existed, and its futile pursuit until the court adjudges that it never had existence is no defense to an action to enforce and actual remedy inconsistent with that first invoked through mistake."

We therefore conclude that the National Company is not barred from maintaining this action under the doctrine of res adjudicata.

Is the National Company entitled to the allowance of its claim upon the contract of idemnity and to the payment of dividends thereon pro rata with general creditors? This precise question came before this court recently in the case of United States F. & G. Co. v. Centropolis Bank of Kansas City, Missouri, et al. (C. C. A. 8) (Opinion filed February 9, 1927), — F. (2) —. We there held that the Surety Company was entitled to the allowance of its claim and to payment of dividends thereon pro rata with other general creditors. We adhere to our former decision.

The decree appealed from is therefore reversed, and the cause remanded with instructions to enter a decree directing the receiver of the bank to allow the claim of the National Company, for the sum of $120,000, on its contract of idemnity, as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to be general creditors.

The costs of this appeal will be assessed equally against the receiver and American Company.

Filed March 28, 1927.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

DECREE—March 28, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, reversed, the costs of this appeal to be assessed equally against the Receiver and the American Surety Company; and it is therefore further ordered, adjudged and decreed by this Court that the National Surety Company, a corporation, have and recover against Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, the sum of — Dollars, and against the American Surety Company, a corporation, the sum of — Dollars for its costs in this behalf expended and have execution therefor.

And it is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with instructions to enter a decree directing Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah, to allow the claim of the National Surety Company for the One Hundred Twenty Thousand and no/100 ($120,000.00) Dollars as its contract of indemnity, as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to general creditors.

March 28, 1927.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING—Filed May 23, 1927

Now comes E. J. Groesbeck and the American Surety Company of New York, a corporation, interpleaded defendants and appellees in the above entitled cause, and each of

them, and respectfully petition the Court for a rehearing herein upon the following grounds and for the following reasons:

I

The Court erred in reversing the decision of the District Court of the United States for the District of Utah herein.

II

The Court erred in holding and determining that this cause be remanded with instructions to enter a decree directing the Receiver of the bank to allow the claim of the National Surety Company for the sum of $120,000.00 on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to general creditors.

III

The Court erred in holding and determining that the National Surety Company is entitled to receive anything by virtue of its contract of indemnity with the bank until E. J. Groesbeck and the American Surety Company of New York, his assignee and subrogee, have been made whole, and until E. J. Groesbeck's entire deposit with the bank has been paid.

IV

The Court erred in following and applying to this case its decision in the case of United States Fidelity & Guaranty Company v. Centropolis Bank of Kansas City, Mo., et al., (C. C. A. 8, opinion filed Feb. 9, 1927) — F. (2d) —, and particularly in applying to this case the doctrine of relation back therein announced and thereby holding that the relation of debtor and creditor existed between the National Surety Company and the bank in this case as of the date of the execution of the bond since "the doctrine of relation 'is a legal fiction invented to promote the ends of justice * * *. It is never allowed to defeat the collateral rights of third persons lawfully acquired.' "

V.

The Court erred in failing to hold that as a matter of contract the bond of the National Surety Company stood behind the entire deposit of the Treasurer, E. J. Groesbeck, and that until that deposit has been paid in full and the Treasurer, E. J. Groesbeck, has been made whole, the National can recover nothing on its indemnity agreement.

VI

The Court erred in failing to hold that it is the final amount left unpaid by the National City Bank which was intended to be secured, and which was secured, by the National Surety Company's bond, and that the National agreed to lose $125,000.00 clear before Groesbeck should lose anything and that, therefore the National ought not and cannot by virtue of its indemnity agreement reimburse itself by receiving dividends from the bank in competition with Groesbeck, thereby depleting the very fund from which Groesbeck alone can be made whole, recouping its own loss so that it does not lose $125,000.00 clear, and substantially reducing the amount which Groesbeck would otherwise receive by way of dividends from the bank.

VII

The Court erred in holding that the National Surety Company is not barred from maintaining this action under and by reason of the doctrine of res adjudicata.

We, therefore, respectfully submit that this petition should be granted and upon a rehearing the decision of this Court be set aside and a decree made affirming the decree of the lower court.

A. M. Cheney, John Jensen, L. R. Martineau, Jr., Harold M. Stephens, Attorneys for Appellees, E. J. Groesbeck and American Surety Co. of New York.

Certificate of Counsel.

Comes now A. M. Cheney, Harold M. Stephens and John Jensen and say that they are solicitors for the appellees,

E. J. Groesbeck and the American Surety Company of New York, in this cause, and they hereby certify that the foregoing petition is well founded and is not made for the purpose of delay, and that the decision of this Court in this cause is erroneous, and that said cause ought to be re-examined and re-heard by this Court.

A. M. Cheney, Harold M. Stephens, John Jensen.

[File endorsement omitted.]

In United States Circuit Court of Appeals

[Title omitted]

Petition for Rehearing—Filed May 24, 1927

Comes now Edward E. Jenkins, receiver of the National City Bank of Salt Lake City, Utah, defendant and appellee in the above entitled cause and moves this court for a rehearing herein upon the following grounds and for the following reasons:

I

The court erred in reversing the decision of the District Court of the United States, for the District of Utah, herein.

II

The court erred in holding that the National Surety Company, plaintiff and appellant, was not barred from maintaining this action under the principle of res adjudicata.

III

The court erred in remanding this cause with instructions to enter a decree herein directing this petitioner, as receiver, to allow the claim of the National Surety Company for the sum of $120,000.00, and to approve said claim of the National Surety Company as a general creditor and to pay dividends thereupon pro rata with other general creditors, including dividends heretofore paid to general creditors.

IV

The court erred in holding that the National Surety Company, plaintiff and appellant, is entitled to receive anything from the assets of the said bank until E. J. Groesbeck, Treasurer of Salt Lake County, and the American Surety Company of New York, his assignee and subrogee, have been made whole and until the entire deposit on account of which said E. J. Groesbeck holds receiver's certificate has been paid in full.

V

The court erred in holding that the National Surety Company is a general creditor of the bank and as such entitled to compete with other general creditors of the bank in the bank's assets.

VI

The court erred in holding that the National Surety Company is a general creditor of the bank upon the ground that to so hold is to constitute the deposit of E. J. Groesbeck in the National City Bank of Salt Lake City, Utah, a preferred deposit.

VII

The court erred in following and applying to this case its decision in the case of United States Fidelity & Guaranty Company v. Centropolis Bank of Kansas City, Mo., et al., (C. C. A. 8, opinion filed Feb. 9, 1927) — F. (2d) —, and particularly in applying to this case the doctrine of relation back therein announced and thereby holding that the relation of debtor and creditor existed between the National Surety Company and the bank in this case as of the date of the execution of the bond since "the doctrine of relation 'is a legal fiction invented to promote the ends of justice. * * * It is never allowed to defeat the collateral rights of third persons lawfully acquired.' "

VIII

The court erred in failing to hold that as a matter of contract the bond of the National Surety Company stood behind the entire deposit of the Treasurer, E. J. Groesbeck, and that until that deposit had been paid in full and the

Treasurer, E. J. Groesbeck, has been made whole, the National can recover nothing on its indemnity agreement.

Wherefore, it is respectfully submitted that this petition should be granted and upon a rehearing the decision of this court should be set aside and a decree made affirming the decree of the lower court.

E. M. Bagley, Robert L. Judd, Paul H. Ray, Solicitors for Edward E. Jenkins, Receiver.

Certificate of Counsel

Come now E. M Bagley, Robert L. Judd and Paul H. Ray, and say that they are solicitors for Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, Utah, defendant and appellee in this cause, and they hereby certify that the foregoing petition is well founded and is not made for the purpose of delay, and that the decision of this court in this cause is erroneous, and that said cause ought to be re-examined and re-heard by this court.

E. M. Bagley, Robert L. Judd, Paul H. Ray.

[File endorsement omitted.]

In United States Circuit Court of Appeals

[Title omitted]

Motion to Amend Decree—Filed May 26, 1927

To the Honorable Judges Booth, Phillips and John B. Sanborn, Presiding in the Above Entitled Case; to Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, Utah, and Bagley, Judd and Ray, His Solicitors; and to American Surety Company of New York, a Corporation, and Cheney, Jensen, Martineau & Stephens, Its Solicitors:

The undersigned, National Surety Company, appellant in the above entitled action, hereby most respectfully requests and moves the above entitled Court to amend its Opinion and Decree herein by adding to the directions made and given by it to the trial court, with reference to the

payment of dividends to the appellant, in the next to the last paragraph of its Opinion herein, of date March 28th, 1927, the following:

"Together with interest at the legal rate on each of said dividends heretofore declared and paid, as and from the date each of said respective dividends was paid by the said Receiver to the other common creditors of said bank."

And also to add the same direction to the last paragraph of its Decree herein of the same date.

This motion is made for the reason that it is apparent from said Opinion and Decree that it is the intention and purpose of the above entitled Court to place the appellant National Surety Company, upon an equality with all other creditors of said National City Bank, and that this can only be accomplished by allowing this appellant interest on the moneys unlawfully withheld from it, from the respective dates upon which each of said dividends was paid; and that said direction was inadvertently omitted by the above entitled Court from its Opinion and Decree herein.

In making this motion, appellant does not wish to be understood as requesting a rehearing or as desiring the Court to change its opinion in any respect whatsoever, but merely to add to and make more clear and definite the directions contained in its Opinion and Decree herein with reference to the payment of dividends to appellant.

In support of this motion, the appellant, National Surety Company, herewith submits a brief of authorities.

Arthur E. Moreton, Attorney for Appellant National Surety Company.

Certificate of Counsel

Arthur E. Moreton hereby certifies that he is solicitor for National Surety Company, plaintiff and appellant herein, that he prepared the foregoing motion, that the same is well-founded, and is not made for the purpose of delay, and that the same ought to be granted by this Honorable Court.

Arthur E. Moreton.

Argument

The motion herein made by the appellant National Surety Company with reference to the requested additional in-

struction to the trial court respecting the allowance of interest, is made for the reason that it is evident from an examination of the Opinion and the decree of the Court herein, that it is the intention of this Honorable Court to put the appellant creditor of said bank, upon an equality with and in exactly the same position as all other common creditors. The only manner in which this can be accomplished is by allowing the appellant the same dividends as have already heretofore been paid to all other cerditors, together with interest on each of said dividends from the respective dates from which each dividend has been withheld from the appellant.

The direction requested with respect to the allowance of interest, was evidently inadvertently omitted from the opinion and decree herein.

In making this motion, appellant does not wish to be understood as requesting a rehearing or as desiring the Court to change its opinion in any respect whatsoever, but merely to add to and make more clear and definite the directions contained in its opinion and decree herein with reference to the payment of dividends to appellant.

The appellant herein was obliged to resort to judicial proceedings in order to compel the Receiver to allow its claim herein. Under such circumstances, appellant National Surety Company, under all the authorities, is entitled to interest on the dividends as and from the date each of said respective dividends was paid.

"Interest will be allowed on dividends when necessary to put creditors on an equality. Thus, a person establishing his claim against a national bank by judicial proceedings, is entitled to interest on the amount of his dividend from the time the dividend was declared and paid to other creditors." 7 C. J. 849.

The case of Armstrong v. American Exchange National Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. Ed. 747, is directly in point and is cited in support of the foregoing text. In that case, (33 L. Ed. pp. 760-761) the Court said:

"In both of the cases it is claimed that the Court erred in adjudging that the plaintiff was entitled to interest on the 25 per cent dividend on its claim, from October 31, 1887, until the time the dividend should be paid. As authority, the receiver cites the case of White v. Knox, 111 U. S. 784

(28:603). But we do not think it applies. In that case a judgment was obtained for a claim by White, in June, 1883, which included interest on his claim to that time. While the claim was in litigation, the receiver had paid ratable dividends of 65 per cent to other creditors. After the judgment in favor of White, the comptroller of the currency calculated the amount due him as of December 20, 1875, the time when the bank failed, and paid him 65 per cent on that amount. He contended that the dividends should be calculated on his claim with interest to the time of the judgment; but this court sustained the action of the comptroller. In the present case, the claims of the plaintiff, as allowed, do not include interest beyond the date when the bank failed. Interest upon the dividend which it ought to have received on the 31st of October, 1887, is a different matter. The allowance of that interest is necessary to put the plaintiff on an equality with the other creditors. That point was not decided in White v. Knox, and we think the circuit court did not err in allowing such interest."

"Equality is equity," and to put this appellant National Surety Company upon an equality with all other common creditors, as is the manifest intention of this Court, it is necessary to allow and direct the trial court to order the receiver to pay to it interest upon the respective dividends wrongfully withheld from it by the Receiver.

The decision in the case of Armstrong v. American Exchange National Bank, supra, was followed by Chief Justice Taft, when a member of the Circuit Court of Appeals, in his opinion in the case of Chemical National Bank v. Armstrong, 59 Fed. 372, in which he said at page 384:

"Now, a part of the reasonable expense of refusing to pay what is believed to be an unjust claim, but which is held thereafter to be a just one, is the damage from the delay to the person to whom the payment should have been made,—a damage which is measured by interest on the amount due and unpaid during such delay. It is equitable and just, therefore, that the share of the other creditors in the assets of the bank should be reduced by enough to pay the interest on the delayed dividends on the $100,000, from the date of the rejection of the claim until such dividends are paid. This conclusion is fully sustained by the decision of the Supreme Court in the case of Armstrong v.

American Exch. Nat. Bank, 133 U. S. 433, 33 L. Ed. 747. In that case—which also grew out — the failure of the Fidelity Bank,—the creditor bank had presented its claim to the receiver in September, 1887, and it was rejected. The circuit court held that the claim should have been allowed, and adjudged that interest must also be allowed on the dividend declared October 31, 1887, until the dividend should be paid. The Supreme Court affirmed the circuit court, both in regard to the validity of the claim and also as to the interest, saying, upon page 470, 133 U. S., and page 760, 33 L. Ed.: 'The allowance of that interest is necessary to put the plaintiff on an equality with other creditors.' "

Just as in the two foregoing cases, "the allowance of interest is necessary to put the plaintiff (appellant) on an equality with other creditors," and "It is equitable and just, therefore, that the share of the other creditors in the assets of the bank should be reduced by enough to pay the interest on the delayed dividends," to this appellant.

The foregoing cases were decided in accordance with the general established rule.

"Where money or property belonging to another is not paid or turned over to the person entitled to receive it at the time it should be paid or turned over, interest is generally allowed for such wrongful withholding thereof, in which case it is allowed as the just measure of damages for the violation of duty." 33 C. J. p. 203, Sec. 59.

"Interest is the measure of damages for withholding money that is due. In such cases it is allowed at law and in equity." Enc. of U. S. Sup. Ct. Rep., Vol. 7, p. 220, under "Allowance of Interest."

"Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor." Redfield v. Ystalyfera Iron Co., 110 U. S. 174, 176, 28 L. Ed. 109.

"Where money is retained by one man against the declared will of another who is entitled to receive it, and who is thus deprived of its use, the rule of courts in ordinary cases is, in suits brought for the recovery of the money, to allow interest as compensation to the creditors for such loss. Interest in such cases is considered as damages, and does not form the basis of the action, but is an incident to the recovery of the principal debt. The right

of action is the right to compel the payment of the money which is being retained. When he who was has this right commences an action for its enforcement, he at the same time acquires a subordinate right, incident to the relief which he may obtain, to demand and receive interest. If, however, the principal sum has been paid, so that, as to it, an action brought cannot be maintained, the opportunity to acquire a right to damages is lost." Enc. of U. S. Sup. Ct. Rep., Vol. 7, p. 222.

"In a large number of cases, interest is stated generally to be an incident of the debt, apparently without regard to the distinction between interest as damages and contractual interest. Perhaps a proper distinction to be drawn is that where interest is recoverable as damages, it is merely an incident of the principal debt and follows the principal as such incident until it is separated and set apart in some manner as a particular debt." 33 C. J. p. 254, Sec. 176.

"Interest follows the principal as the shadow does the substance." Havender v. Brodbeck, 83 Misc. 9, 11, 144 N. Y. S. 418; Hatcher v. Lewis, 4 Rand (25 Va.) 152, 157. To same effect, McVeigh v. Howard, 87 Va. 599, 13 S. E. 31; Jones v. Williams, 2 Call (6 Va.) 102.

"In equity, interest goes with the principal, as the fruit with the tree." Himely v. Rose, 5 Cranch, 313, 319, 3 L. Ed. 111.

The fact that the defendant is a fiduciary does not change the rule with reference to the allowance of interest on moneys in his hands, as is illustrated by the case of Armstrong v. American Exchange National Bank of Chicago, supra, and Chemical National Bank v. Armstrong, supra.

"Interest is recoverable on judgments rendered against persons in their fiduciary capacities, and affecting the funds in their hands, as upon other judgments." 33 C. J. 215, Sec. 85.

The present action is one in equity, and as is aptly and clearly stated at page 47 of the brief of appellee Jenkins Receiver, "involves not only the necessity of adjudicating the right of the National to have its claim allowed, but a judicial apportionment of the bank's assets and a determination as to the extent to which the National may be en-

titled to participate, and the point of time when such participation might begin. Such relief is equitable. Only a Court of equity can apportion the assets of a bank in receivership to the several persons beneficially interested therein," citing cases.

In 21 C. J. p. 661, under the title "Equity," it is stated:

"And the court has a broad discretion in framing its decrees in order to adapt the relief to the circumstances of particular cases. It will adjust the relief in such a way as to afford fair protection to the rights of all parties, and may grant any relief within the issues made by the pleadings. The primary object of a decree in equity is to reach the ends of justice. Equity procedure is usually elastic enough to accomplish this result, and the court shapes its decree accordingly."

Interest follows the allowance of the claim as a necessary legal consequence, and as a matter of right.

If the appellant National Surety Company is entitled to interest, as we assume that it is, the interest should be at the legal rate, which is eight per cent in Utah, and should be paid on each of the dividends heretofore paid by the Receiver, as and from the date each of said respective dividends was declared and paid by the Receiver to the other creditors of the bank.

The Transcript of the Record herein shows clearly the dates and amounts of dividends heretofore declared and paid by the Receiver. The certificate of the Receiver, issued on the claim of Salt Lake County, appears in the Transcript of the Record at pages 153 to 155, and shows the following dividends to have been declared and paid:

1st dividend, 20%, Paid September 6, 1922.
2nd dividend, 10%, Paid February 27, 1923.
3rd dividend, 10%, Paid May 29, 1924.
4th dividend, 10%, Paid November 8, 1924.
5th dividend, 10%, Paid May 7, 1925.

The claim of the appellant herein was presented to the Receiver of the National City Bank on August 7th, 1922, prior to the payment of any dividends (Tr. 99-105), and demanded that it be reimbursed for the payment made by it. (Tr. 105). This claim was rejected by the Receiver. (Tr. 106).

The appellant, in the prayer of its complaint, prayed that its claim be allowed, that it be decreed that it be "entitled to participate with the other creditors of said bank ratably in all distribution of dividends, including all dividends yet to be paid, as well as those already paid by said defendant Receiver, and that the defendant Receiver be directed to pay to this plaintiff dividends in the amount and upon the same basis as paid to other claimants in the list of common creditors." Without the allowance of interest, appellant will not share ratably nor upon the same basis as other common creditors. The prayer of the complaint is sufficiently broad, particularly since the action is one in equity and inasmuch as the allowance of interest is an incident of the debt and follows the principal and has accrued on the principal in the nature of damages, by reason of the Receiver wrongfully withholding the same. The directions of this Court to the trial court should include the allowance of interest, because "in equity interest goes with the principal as the fruit with the tree."

"Where interest is recoverable as damages and as a legal incident of the debt sued on, or where the allowance is required under equitable principles, interest should be allowed, although no demand is made therefor in the bill or declaration." 33 C. J. p. 257, Sec. 188.

There can be no question but what this Court has the power to add to or amend its directions to the trial court. In the case of Hovey v. McDonald, 109 U. S. 150, 27 L. Ed. 888, the Court said:

"In the present case the correction of the form of the decree by adding the direction to the Receiver to pay over the money in his hands to the defendant, was a thing of course, it was merely expressing the legal effect and consequence of the decree."

In the case of Bank v. Wistar, 3 Pet. 431, 7 L. Ed. 731, where the Clerk of the Court had omitted to enter the judgment of the Federal Supreme Court allowing to the defendant in error on the affirmance of the judgment of the Circuit Court, interest at the rate of six per cent, the Supreme Court, upon motion to amend the mandate, ordered the judgment to be reformed, allowing interest at the rate of six per cent. Such amendments or corrections can be made, or

some ordinary direction which has been omitted should be added, upon motion, without the form or expense of a rehearing.

In the case of Insurance Co. v. Boon, 95 U. S. 117, 125, 24 L. E. 395, Mr. Justice Strong said:

It is a general doctrine that Courts always have jurisdiction over their records to make them confom to what was actually done at the time. * * * Even judgments may be corrected in accordance with the truth."

"We have no doubt of our power at any time to amend a decree which has, by inadvertence or mistake, been entered in a different form from that which we intended." Gaynor vs. U. S., 193 U. S. 451, 48 L. Ed. 745.

In the case of Twin Falls Land Co. vs. Caldwell, 266 U. S. 85, 69 L. Ed. 180, it is stated:

"In our opinion, it is quite admissable in the circumstances, for the Circuit Court of Appeals to change its first decision and correct the mistake therein without granting a rehearing. The parties have been fully heard at the beginning."

Therefore, in view of the fact that the direction requested with respect to the question of interest, was inadvertently omitted, and since it is within the power of this court to add such direction without granting a rehearing, inasmuch as the parties were fully heard at the beginning, and since the dates and amounts of the dividends heretofore paid to other creditors, is in the record, appellant most respectfully requests this Court to grant its motion herein.

Respectfully submitted.

Arthur E. Moreton, Attorney for Appellant National Surety Company.

N. B.—We think the attention of this Honorable Court should be called to the fact that since the record herein was made up, and since the hearing herein, that the American Surety Company has received the sum of approximately $90,000.00 from the sale of the Crystal Lake bonds, which it was authorized to sell pursuant to the decree in the former action. (Tr. 108). This, of course, is not shown by the record, but we conceive it to be, not only our right, but out duty as solicitors of this Court, to call that fact to the

attention of this Honorable Court, inasmuch as it reduces the claim of the American Surety Company by that amount.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

REPLY TO FOOT NOTE OF MOTION TO AMEND DECREE—Filed May 31, 1927

E. J. Groesbeck and the American Surety Company have been served with a purported "Motion to Amend Decree" in the above entitled case. We understand that under the rules of this Court and at this stage of the procedings in the cause we have no right to reply to this purported "Motion to Amend Decree" as such. We shall, therefore, not assume to infringe upon the rules of the Court but shall await an opportunity to reply upon a re-hearing of the case, if the same be granted.

There is, however, a foot note at the bottom of page nine of the purported "Motion to Amend Decree" upon which it is our desire to comment.

The National Surety Company would apparently by this foot note, stating facts off the record, seek to leave an inference that, by payments from the sale of the Crystal Lake bonds and by dividends to be received from the bank, Mr. Groesbeck and his assignee and subrogee the American Surety Company will be paid in full. The purpose is obviously to make inapplicable the principles of law upon which we have relied in our petition for re-hearing, and brief in support thereof, with respect to rights of obligees who have not been paid in full.

The assertion of fact in the foot note in question is not only off the record but the inference sought to be drawn therefrom is incorrect: and the legal principles upon which we are relying therefore still stand applicable in this case. We have, therefore, felt that it was not only our right but our duty to file this brief reply to the foot note.

The payments from the sale of the Crystal Lake bonds were received in December, 1926, and thereafter, all subse-

quent to the trial and argument on appeal of this case, and are, therefore, matters outside of the record. The inference sought to be drawn is incorrect in fact because dependable information furnished us by the Receiver subsequent to the serving upon us of the purported "Motion to Amend Decree," with its foot note, is to the effect that his original estimate of dividends was over-sanguine and that even allowing for the proceeds from the sale of Crystal Lake bonds, now received in full, and all dividends yet to be paid, Mr. Groesbeck will, under the present decision of this Honorable Court, fall short of being paid in full by over Thirty Thousand Dollars ($30,000.00), and it may exceed Forty Thousand Dollars ($40,000.00). This means that Mr. Groesbeck will be owing the amount of this deficiency plus the costs and legal expenses incurred in this extensive litigation, if the decision of this Honorable Court stands, and under these circumstances it would be most unfair to him to have this Court left with any impression or opinion that because of such aggregate payments from the sale of Crystal Lake bonds Mr. Groesbeck is assured, through future dividends from the bank, of being paid in full, when the contrary is, most unfortunately for him,—an innocent party, the situation.

If the petition for re-hearing heretofore filed by Mr. Groesbeck and the American Surety Company in this case is granted we shall be fully prepared to substantiate the foregoing assertions of fact.

Respectfully submitted.

A. M. Cheney, John Jensen, L. R. Martineau, Jr., Harold M. Stephens, Solicitors for Appellees.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

SUPPLEMENT TO PETITION OF EDWARD E. JENKINS FOR REHEARING—Filed June 6, 1927

Subsequent to the filing of our petition for a rehearing of this case, the National Surety Company filed a document

entitled "Motion to Amend Decree." As we understand the rules we are not at liberty to answer that motion. There is, however, appended to that motion a foot note whereby the National seeks to leave the impression with this court that there has been a sale of the Crystal Farm bonds for a sum sufficient to make Treasurer Groesbeck whole on his deposit. We believe that the appendage of that foot note justifies and requires this supplement to our petition for rehearing.

This case was tried and decided upon the evidence presented to the trial court and upon that record the case was argued and submitted to this court.

The national went outside of that record in its foot note in order to advise the court of an asserted change in the situation which arose more than six months after the case was argued and submitted. The National did not, however, conceive it to be its right or duty to advise the court of all changes in the situation affecting the parties. The receiver advises that since the trial of this case the bank's assets have so shrunk that in no event will Treasurer Groesbeck be paid in full. Even if the decision of the trial court should be ultimately affirmed, the Treasurer will not be wholly repaid.

Payments made from the sale of Crystal Farm bonds can have no legal importance in this case unless their effect is to result in full payment to Treasurer Groesbeck and the American Surety Company.

The National by its foot note would leave the ugly inference that defendants and appellees were asking for rehearing of this case after Treasurer Groesbeck and the American had been made whole. How idle such conduct on the part of the treasurer and the American would be! No such inference is justified.

Counsel for the National can attach no importance to the matter contained in his foot note except upon the theory that we have correctly stated the law in our petition for rehearing; and he is therefore, required to go outside the record in an effort to escape by resort to facts not in the record. By the position he now takes he seems to invite a rehearing.

We earnestly submit that this case must be decided upon the record upon which it was tried and not upon that record supplemented by fragmentary suggestions made by counsel upon matters outside the record. We should like nothing

better than an opportunity to judicially establish the truth of the statements herein contained and respectfully urge again that our petition for rehearing be granted.

We are informed and verily believe that the facts herein stated are true and correct and feel that our petition for rehearing should be granted.

E. M. Bagley, Robert L. Judd, Paul H. Ray, Solicitors for Edward E. Jenkins, Receiver, Defendant and Appellee.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITIONS FOR REHEARING AND MOTION TO AMEND DECREE—June 14, 1927

This cause came on to be heard on the petitions for a rehearing, filed by Counsel for appellees, the motion of Appellant to amend the decree and the supplement to petition for rehearing filed by counsel for the appellee Jenkins, as Receiver, etc.

On Consideration Whereof, it is now here ordered by this Court, That said petitions for a rehearing and motion to amend the decree be, and they are each hereby, denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR STAY OF MANDATE—Filed June 21, 1927

Western Union Telegram

Salt Lake City, Utah, Jun. 21, 1927.

1.10 P.

E. E. Koch, Clerk U. S. Circuit Court of Appeals, St. Paul:

Your letter June fifteenth National Surety against Jenkins Receiver Stop Appellees intend filing petition writ certiorari Supreme Court as soon as same can be prepared Kindly show this wire to Court or Judge thereof and

please request order staying issuance mandate and enforcement decree to allow filing our Petition for writ certiorari and advise fully by wire our expense.

Cheney, Jensen, Martineau and Stephens, Bagley, Judd and Ray. 3.18 P.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Staying Mandate—June 21, 1927

Upon consideration of the motion of counsel for the appellees for an order staying the issuance of the mandate to allow the filing of a petition for a writ of certiorari in the Supreme Court of the United States, It is now here ordered by this Court that the issuance of the mandate in this cause, be, and the same is hereby, stayed for a period of sixty days from and after this date, unless otherwise ordered by this Court.

Clerk's certificate to forgoing transcript omitted in printing.

Supreme Court of the United States

Order Allowing Certiorari—Filed October 31, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT of the United States

EDWARD E. JENKINS, receiver of The National City Bank of Salt Lake City, Utah, et al.,
Petitioners,

vs.

NATIONAL SURETY COMPANY OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Edward E. Jenkins, as receiver of The National City Bank of Salt Lake City, Utah, E. J. Groesbeck, treasurer of Salt Lake County, Utah, the American Surety Company of New York, a corporation organized under the laws of the State of New York, respectfully present to this court this their petition for a writ of certiorari addressed to the Circuit Court of Appeals for the Eighth Circuit, commanding said court and the clerk thereof to certify to this court the record and proceedings in the case in said court wherein your petitioners are appellees and the respondent herein is appellant (C. C. A. No. 7409), together

with the opinion of the court therein for review and determination of said cause by this court.

In this behalf petitioners state the following facts:

I.

Your petitioners exhibit as part of this petition a certified copy of the record furnished the Circuit Court of Appeals, a printed copy of the proceedings in the Circuit Court of Appeals, including its decree of reversal, and the opinion of the District Court, together with a brief in support of this petition.

II.

On April 28, 1925, the respondent, National Surety Company of New York, brought its complaint against the receiver of The National City Bank of Salt Lake City to compel the allowance of its claim as a creditor of the bank in the sum of $120,000.00, based upon an indemnity agreement entered into between the failed bank and the National Surety Company at the time of the execution of the depository bond furnished by the bank to Groesbeck, and further to compel the payment by the receiver of dividends on said claim. At the instance of the receiver, the American Surety Company of New York and E. J. Groesbeck, as treasurer of Salt Lake County, were required to interplead in the action.

III.

E. J. Groesbeck was the county treasurer of Salt Lake County and the funds which came into his hands as such county treasurer he deposited with The National City Bank of Salt Lake City.

When E. J. Groesbeck qualified as treasurer of Salt Lake County he, as principal, and the American Surety Company of New York, as surety, executed and delivered to Salt Lake County an official fidelity bond in the sum of $200,000.00.

To protect the deposits made by him in the bank Groesbeck secured from the bank, as principal, three depository bonds: one executed by the National Surety Company, as surety, in the sum of $125,000.00, one by the Fidelity & Deposit Company of Maryland, as surety, in the sum of $75,000.00, one by the Massachusetts Bonding & Insurance Company, as surety, in the sum of $25,000.00. These three bonds ran to E. J. Groesbeck, treasurer of Salt Lake County, Utah, as obligee.

The National Surety Company's depository bond provided that if the bank "shall well and truly keep all sums of money so deposited or to be deposited" and "shall pay over the same" upon Groesbeck's demand and "shall in all respects save and keep the said Edward J. Grosbeck, treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue." (R. 63-64.) By way of further depository security the bank deposited with E. J. Groesbeck Crystal Lake Farm bonds of the par value of $360,000.00.

In its application to the National Surety Company for the depository bond executed by that company as surety, the bank agreed to indemnify the National Surety Company for all losses it might suffer thereunder. It is upon this indemnity agreement that the National Surety Company bases its claim and predicates this suit.

IV.

At the time of the failure of the bank on January 17, 1922 Groesbeck's deposits amounted to $643,094.29. Salt

Lake County has been repaid in full by Groesbeck and his surety, the American Surety Company, as follows: by the American Surety Company of New York $200,000.00 principal, $23,362.15 interest; by $125,000.00 secured from the National Surety Company; by $75,000.00 secured from the Fidelity & Deposit Company; by $25,000.00 secured from the Massachusetts Bonding Company; by $218,094.29 dividends received from Jenkins as receiver.

V.

Groesbeck's deposit has not yet been repaid and there is no prospect that either he or his assignee or subrogee, the American Surety Company, will ever be repaid or made whole by many thousands of dollars if the present decision of the Circuit Court of Appeals stands and if the National Surety Company is thereby allowed to compete with Groesbeck and his assignee in the enjoyment of dividends from the bank's assets.

VI.

This is the second suit between these parties involving the right to dividends from the receiver of the National City Bank of Salt Lake City. In the first suit the National Surety Company, as an interpleaded defendant, asserted that it and not E. J. Groesbeck or his assignee and subrogee the American Surety Company of New York, was entitled, upon payment in full to the county, to be subrogated to all future dividends paid on account of Groesbeck's deposit. The National also asserted it was entitled to have its indemnity claim allowed and dividends paid thereon. The indemnity claim relied upon in the first suit was re-filed and made the basis of this suit. The claim filed discloses that $5,000.00 of the $125,000.00 paid by the National Surety Company was assigned to the American Indemnity Com-

pany of Galveston, Texas. In the first suit the National Surety Company stipulated that until Salt Lake County was paid in full it was not entitled to receive anything from Jenkins as receiver. (R. 151.)

VII.

In the first suit the American Surety Company filed an answer denying the right of the National Surety Company to subrogation or to recover dividends under its indemnity agreement. The District Court decided that E. J. Groesbeck and the American Surety Company of New York, his assignee and subrogee, were entitled to prior rights of subrogation, both as to dividends from the bank, and to the proceeds of the Crystal Lake Farm bonds until Groesbeck's deposit had been wholly repaid and until the sum previously paid to Salt Lake County by the American Surety Company of New York, to-wit, $223,362.15, with interest as specified in the decree, had been paid in full before the National Surety Company could receive anything upon its claims as shown by its complaint in intervention. (R. 107-109.) That decision was affirmed by the Circuit Court of Appeals (See National Surety Company v. Salt Lake County, 5 Fed. (2d) 34. (R. 110.)

At the conclusion of that litigation the National Surety Company re-filed its indemnity claim relied upon in the first suit and thereupon brought its present complaint.

VIII.

The District Court, upon the trial of this action, held that the subject matter of the action was fully determined and adjudicated by its prior decree and approved and allowed the National Surety Company's claim subject, however, to the limitation and qualification that it should have

and recover nothing from the receiver until Groesbeck and his assignee, the American Surety Company, have received from the assets of the bank, including proceeds from the Crystal Lake Farm bonds, the sum of $223,362.15, together with interest on the sum of $200,000.00 from February 29, 1924, as provided in the prior decree of the court. The decree further qualified the allowance of the National Surety's claim by providing that its allowance "shall not affect the present basis of computing and paying dividends as now established by the receiver upon claims heretofore approved." (R. 51-52.)

IX.

This case went to the Circuit Court of Appeals and on March 28, 1927, that court, in an opinion delivered by District Judge Phillips and concurred in by District Judge J. B. Sanborn and Circuit Judge Booth, ordered the decree of the District Court reversed and the cause remanded with instructions to enter a decree directing the receiver to approve and allow the claim of the National Surety Company for the sum of $120,000.00 on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to general creditors.

The Circuit Court of Appeals decided that the subject matter of this controversy was not re judicata and further decided that even though the record discloses without contradiction that E. J. Groesbeck, the depositor, has not been paid in full, still the National Surety Company, which guaranteed his deposit, may to his detriment receive dividends from, and thereby deplete, the only fund to which he can look for repayment. The briefs of both parties filed with the Circuit Court of Appeals in connection with the petition for rehearing and modification of the de-

cree disclose that the Crystal Lake bonds have been disposed of but that the proceeds received from that source plus bank dividends have not yet paid Groesbeck and his assignee in full, and the only remaining source from which they may be paid the many thousands of dollars still due them is through possible future dividends from the receiver.

X.

The amount of Groesbeck's deposit on the day the bank failed was $643,094.29. By reason of a special provision in its bond, the Fidelity & Deposit Company, upon payment of its depository bond, was given a receiver's certificate in the sum of $75,000.00, thereby reducing Groesbeck's claim against the receiver to $568,094.29. The amount of approved claims against the bank, according to the record, is $1,583,926.88. (R. 70.) It follows that Groesbeck's claim amounts to more than one-third of all approved claims against the bank, and if the decision of the Circuit Court of Appeals stands it will result that of every dollar the National Surety Company receives it will get one-third of that dollar at Groesbeck's loss and expense.

The receiver has paid 60 per cent to general creditors. Under the decision of the Circuit Court of Appeals the National Surety Company and its assignee will receive that 60 per cent or $75,000.00 at once. Approximately $25,000.00 of that amount would otherwise go to help make Groesbeck and his assignee and subrogee whole. There will be a similar proportionate loss to Groesbeck on any future dividends which may be paid. It will result under the decision of the Circuit Court of Appeals that the National Surety Company, which guaranteed the whole of E. J. Groesbeck's deposit and agreed that it would, in any event, lose $125,000.00 before Groesbeck should lose anything, will reduce

its and its assignee's loss at least $75,000 while he and the American are still unpaid.

XI.

Groesbeck, in his application to the American Surety Company for his official bond, agreed, as the bank did in its application to the National for depository bond, to indemnify the American Surety Company against loss.

XII.

Petitioners seek a review of the decision of the Circuit Court of Appeals reversing the judgment of the trial court.

THE QUESTIONS AND PROPOSITIONS OF LAW INVOLVED IN THE CASE ARE SUBSTANTIALLY AS FOLLOWS:

1. Is a depository surety entitled to receive dividends from a failed bank before its obligee, who deposited funds with the bank in reliance upon such surety's bond, has been paid in full where such surety guaranteed such deposit without qualification or limitation save as to the penalty of its bond?

2. Is such surety company, by virtue of its indemnity agreement with the bank, its principal, a creditor of the receiver in such a sense as to be entitled to receive pro rata dividends with those who were depositors and creditors of the bank prior to its failure?

3. Did the decision of the District Court, affirmed by the Circuit Court of Appeals in the first case between these parties adjudicate and dispose of the right of the National Surety Company to recover upon its claim based upon its indemnity agreement in such a way as to render that question res judicata in the present litigation?

4. In view of the decision of the District Court and the Circuit Court of Appeals in the first case between these

parties, which litigation involved this identical fund, can the National now claim rights through the remedy of indemnity which render nugatory and nullify the result of the prior decision of the Circuit Court of Appeals? Does not the decision in the original case establish the contractual obligation of the National as standing behind Groesbeck's entire deposit, even though the National's bond has a limited penalty, and prevent the National from receiving anything at Groesbeck's expense until that contractual obligation has been fully discharged by the National?

5. Does payment by a depository surety of the penalty of its bond, after the failure of the bank, establish the relationship of debtor and creditor between the surety and the bank from the date of the execution of said depository bond so as to entitle the surety to share in dividends with its obligee and other depositors in the bank before the depositor whom it assured is repaid?

The foregoing questions and propositions of law, which petitioners state are involved in this case, were duly raised and argued by petitioners in said District Court and in said Circuit Court of Appeals.

THE GROUNDS JUSTIFYING THE ISSUANCE OF THE WRIT.

Upon this statement of the facts and the record in the cause, the petitioners submit the following reasons, among others, why the writ herein prayed for should be allowed and why the decree of the Circuit Court of Appeals reversing the decree of the District Court and remanding the cause to that court with directions to allow the National Surety Company's claim and to pay dividends thereon, should be brought here for review by this court:

1. The decision of the Circuit Court of Appeals creates a conflict of decisions between the Circuit Courts

of Appeals of the United States, in that the decision complained of is opposed to and squarely at variance with the decision of the Fourth Circuit Court of Appeals in the case of Maryland Casualty Company v. Fouts, Lacy, State Treasurer of North Carolina, 11 Fed. (2d) 71, and with the decision of the Sixth Circuit Court of Appeals in Springfield National Bank, et al. v. American Surety Company of New York, 7 Fed. 2d. 44, and with the decision of the Ninth Circuit Court of Appeals in Fidelity and Deposit Company of Maryland v. Robinson, 7 Fed. (2d) 371, wherein the identical questions raised and decided by the Eighth Circuit Court of Appeals in this case are raised and an opposite result is reached.

2. These conflicting decisions in the different circuits involve a matter of general and public interest that is bound almost certainly to arise with every failure of a national bank and should be reconciled and one uniform ruling established. The Government of the United States by and through the Comptroller of the Currency, is engaged in the liquidation of failed national banks throughout the entire United States. Pending the laying down of such uniform rule depositors in failed national banks will receive more in some circuits and less in others, depending upon whether depository sureties do or do not share with them as creditors in dividends paid by the bank. The National Banking Act enjoins upon the Comptroller of the Currency and his several receivers the establishment of a basis for the payment of dividends which will eventuate in all cases in fair and ratable distribution of the bank's assets. Until this question is settled by this court the Comptroller of the Currency cannot establish in all circuits a uniform basis of computing and paying dividends. If the parties in this litigation resided in the Fourth Circuit, Groesbeck and the other depositors of the National City Bank would enjoy

that portion of the assets of the bank which the Circuit Court of Appeals of the Eighth Circuit has directed the receiver to pay to the National and which would have to be paid to other depository sureties similarly situated.

This is not only an important question that vitally affects depositors in banks generally and especially in national banks, and that affects the Comptroller's uniformity of set up, but it is also a question that vitally affects the surety companies and all banks of the country since they now have occasion to furnish and secure, practically without exception, depository bonds in larger or smaller amounts. This problem therefore affects an important branch of the Treasury Department, as well as bank depositors, banks, and surety companies and is a question of general public concern and importance that should be settled once and for all so that uniformity in rights and liabilities throughout all the circuits will be established.

3. The decision of the Circuit Court of Appeals herein allowing the National's claim and the payment of dividends thereon involves a ruling upon important questions of general law that is untenable and that is contrary to the great weight of authority.

4. The decision of the Eighth Circuit Court of Appeals conflicts with the decision of the same court in the former case involving the same parties and the same funds.

5. The decision of the Circuit Court of Appeals involves the construction of the National Banking Act and the distribution of assets of failed banks thereunder and effects an unfair distribution of the assets under that Act.

6. The doctrine of relation back announced in the decision of the case of United States Fidelity and Guaranty Company v. Centropolis Bank of Kansas City, Mo., et. al. (C.C. A. 8 opinion filed February 9, 1927, 17 Fed. (2d) 913) which decision is made to control the suretyship aspect

of the court's decision in this case, and by virtue of which doctrine the relation of debtor and creditor between the National Surety Company and the National City Bank of Salt Lake City is in effect held to have existed from the date of the execution of the bond and indemnity agreement herein sued upon, is at variance with the great weight of authority. It conflicts with the rulings of other Circuit Courts of Appeal and the uniform decisions of this court on the very proposition of relation back down as late as the case of United States Fidelity and Guaranty Company v. Wooldridge, Rec., 268 U. S. 234, 69 L. Ed. 932. The Circuit Court of Appeals failed to follow or give any force and effect to the rulings and decisions of this court on the doctrine of relation back.

7. The Circuit Court of Appeals erred in reversing the decision herein of the District Court of the United States for the District of Utah.

8. The Circuit Court of Appeals erred in holding and determining that this cause be remanded with instructions to enter a decree directing the receiver of the bank to allow the claim of the National Surety Company for the sum of $120,000.00 on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to general creditors.

9. The Circuit Court of Appeals erred in holding and determining that the National Surety Company is entitled to receive anything by virtue of its contract of indemnity with the bank until E. J. Groesbeck and the American Surety Company of New York, his assignee and subrogee, have been made whole and until E. J. Groesbeck's entire deposit with the bank has been paid.

10. The Circuit Court of Appeals erred in failing to hold that as a matter of contract the bond of the National

Surety Company stood behind the entire deposit of the Treasurer E. J. Groesbeck, and that until that deposit has been paid in full and the Treasurer E. J. Groesbeck has been made whole, the National Surety Company can recover nothing on its indemnity agreement. The decision in this respect is squarely in conflict with the prior decision of the Circuit Court of Appeals between these same parties.

11. The Circuit Court of Appeals erred in holding that the National Surety Company is not barred from maintaining this action under and by reason of the doctrine of res judicata.

12. The Circuit Court of Appeals erred in failing to hold that it is the final amount left unpaid by the National City Bank which was intended to be secured and which was secured by the National Surety Company's bond, and that the National Surety Company agreed to lose $125,000.00 clear before E. J. Groesbeck should lose anything and that, therefore, the National ought not and cannot by virtue of its indemnity agreement, reimburse itself by receiving dividends from the bank in competition with Groesbeck, thereby depleting the very fund from which alone Groesbeck can be made whole, recouping its own loss so that it does not lose $125,000.00 clear, and substantially reducing the amount which Groesbeck would otherwise receive by way of dividends from the bank.

Your petitioners are advised that the decree of the Circuit Court of Appeals is final and is erroneous and that this Honorable Court should require the case to be certified to it for its review and determination under the Act of Congress permitting such cases to be certified to this court for its revision.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of

Appeals for the Eighth Circuit, commanding said court to certify and send to this court on a day certain to be in said writ designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in this case which was entitled in that court "National Surety Company, a corporation, Appellant, v. Edward E. Jenkins, receiver of National City Bank of Salt Lake City, Utah, et. al., Appelles, No. 7409" to the end that said cause may be reviewed and determined by this court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate, and that the said decision of the said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

EMMETT M. BAGLEY,
Solicitor for
EDWARD E. JENKINS,
Receiver National City Bank.
Petitioner.

JOHN JENSEN,
Solicitor for
AMERICAN SURETY COMPANY OF NEW YORK,
E. J. GROESBECK,
Petitioners.

ROBERT L. JUDD,
PAUL H. RAY,
of Counsel.
A. M. CHENEY,
HAROLD M. STEPHENS,
of Counsel.

STATE OF UTAH,
COUNTY OF SALT LAKE. } ss.

JOHN JENSEN, being first duly sworn, on his oath deposes and says:

That he is one of the Solicitors for E. J. Groesbeck and the American Surety Company of New York, petitioners in the above entitled action; that he knows the facts stated in said petition and of the proceedings had in said cause, and that the facts therein are true to the best of his knowledge and belief.

JOHN JENSEN.

Subscribed and sworn to before me this 13th day of July, 1927.

MANOLA JORGENSEN,
Notary Public.
Residence: Salt Lake City, Utah.

STATE OFUTAH
COUNTY OF SALT LAKE } ss.

E. M.BAGLEY, being first duly sworn, on his oath, deposes and says:

That he is one of the Solicitors for Edward E. Jenkins, receiver of the National City Bank of Salt Lake City, Utah, petitioner in the above entitled action; that he knows the facts stated in said petition and of the proceedings had in said cause, and that the facts therein are true to the best of his knowledge and belief.

E. M. BAGLEY

Subscribed and sworn to before me this 13th day of July, 1927.

MANOLA JORGENSEN,
Notary Public.
Residence: Salt Lake City, Utah.

CERTIFICATE OF COUNSEL

We and each of us de hereby certify that we have severally examined the foregoing petition for a writ of certiorari, and that the allegations therein are true as we verily believe, and it is our opinion that the petition is well founded and the case is one in which the prayer of the petitioners should be granted by the court.

EMMETT M. BAGLEY
ROBER L. JUDD
PAUL H. RAY
Solicitors of Edward E. Jenkins, Receiver.

A. M. CHENEY
JOHN JENSEN
HAROLD STEPHENS
Solicitors for E. J. Groesbeck, American Surety Company.

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD E. JENKINS, receiver of The National City Bank of Salt Lake City, Utah, et al.,

Petitioners,

vs.

NATIONAL SURETY COMPANY OF NEW YORK,

Respondent.

BRIEF IN SUPPORT OF PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS OF COURTS BELOW

The decree of the District Court for the District of Utah in this case dated December 31, 1925, appears at page 51 of the record, and the opinion of the Circuit Court of Appeals of the Eighth Circuit dated March 28, 1927 (rehearing denied June 14, 1927), reversing the decree of the District Court appears at page 232 thereof. (18 Fed. (2d.) 707). The Circuit Court's holding on the suretyship aspect of this case is controlled by and rested upon its decission in the case of United States Fidelity & Guaranty Company v. Centropolis Bank of Kansas City, Mo., et al., opinion filed February 9, 1927, (17 Fed. (2d) 913), and for the convenience of the court is printed in full as an appendix to this brief.

The decree of the District Court in the first case between these same parties involving this same matter appears at page 107 of the record, and the opinion of the Cir-

cuit Court of Appeals of the Eighth Circuit affirming that decree appears at page 110 thereof (5 Fed. (2d) 34).

JURISDICTION

The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (c. 229, 43 Stat. 936, 938).

STATEMENT OF FACTS

Edward E. Jenkins is receiver of the National City Bank of Salt Lake City, Utah. Up until January 17, 1922, the day of its failure, the bank was engaged in a general banking business in Salt Lake City, Utah. E. J. Groesbeck was treasurer of Salt Lake County. Upon his election and qualification as such he, as principal, and the American Surety Company, as surety, gave to Salt Lake County a fidelity bond in the sum of $200,000.00, conditioned upon his safely keeping all funds of Salt Lake County coming into his hands as treasurer. Thereafter Groesbeck deposited funds coming into his hands as treasurer with the National City Bank. To protect his deposit Groesbeck received from the bank three depository bonds: one for $125,000.00 with the National Surety Company as surety; one for $75,000.00 with the Fidelity and Deposit Company of Maryland as surety, which provided for immediate pro tanto subrogation; one for $25,000.00 with the Massachusetts Bonding & Insurance Company as surety. In addition the bank delivered to Groesbeck as collateral $360,000.00 par value of the bonds of the Crystal Lake Farms Company. The briefs on petition for rehearing and motion of the National to modify decree disclose that since the argument before the Circuit Court of Appeals the Crystal Lake Farm bonds have been sold for slightly less than $90,000.00.

This fact does not alter the case as Groesbeck and his assignee, the American, are still unpaid and have no prospect of being paid in full by many thousands of dollars if the decision of the Circuit Court of Appeals stands.

When Groesbeck as treasurer applied to the American Surety Company for his $200,000.00 official bond he agreed to indemnify and save said company free from loss on account of said bond. When the bank procured the depository bonds from the National Surety Company, Fidelity and Deposit Company of Maryland and the Massachusetts Bonding & Insurance Company it agreed to indemnify and save those companies harmless and free from loss on the depository bonds.

The National Surety Company's depository bond provided that if the bank "shall well and truly keep all sums of money so deposited or to be deposited" and "shall pay over the same" upon Groesbeck's demand, and "shall in all respects save and keep the said Edward J. Groesbeck, treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue." (R. 63-64). It will be observed that the National's bond is a guarantee for the whole of Groesbeck's deposit without limitation or condition save as to penalty.

For brevity and convenience Edward E. Jenkins, as receiver, will hereinafter be referred to as receiver; E. J. Groesbeck, treasurer, will be referred to hereinafter as Groesbeck; the National Surety Company as the National, and the American Surety Company as the American.

Upon the day the bank failed Groesbeck had on deposit $643,094.29. This sum was deposited by him as treasurer of Salt Lake County, and Salt Lake County has been repaid in full as follows:

By the American Surety Company as surety on Groesbeck's official bond	$200,000.00
By the National Surety Company as depository surety	125,000.00
By the Fidelity and Deposit Company as depository surety	75,000.00
By the Massachusetts Bonding & Insurance Company as depository surety	25,000.00
By dividends from the receiver on account of the treasurer's deposit	218,094.29
Total	$643,094.29

It will be seen that Salt Lake County was made whole not alone by the payment of the depository bonds and dividends but by those payments plus $200,000.00 paid by the American as surety for Groesbeck. The American having paid this sum, together with $23,362.15 interest, and Groesbeck, being indebted to the American in that amount, he thereupon assigned to the American his rights against the bank and its receiver.

When it became apparent that the County was about to be made whole on account of moneys which Groesbeck had deposited in the bank, Groesbeck and the American made claim upon the receiver that they were entitled to all future dividends accruing on account of Groesbeck's deposit until such time as they were made whole. At the same time the National Surety Company and the Massachusetts Bonding & Insurance Company, as depository sureties, made claim to the receiver that they, having paid the full penalties of their depository bonds, were entitled to pro tanto subrogation against the receiver to the amount of their payments and were thereafter entitled to receive their pro tanto share of dividends on Groesbeck's deposit even before Groesbeck and the American were reimbursed. The de-

pository sureties also advanced their claims upon their indemnity agreements and demanded approval of their claims and payment of dividends thereon.

All parties agreed that by the terms of its bond the Fidelity and Deposit Company was, upon payment of the penalty of its bond, entitled to immediate subrogation in that amount. This resulted in a reduction of Groesbeck's claim from $643,094.29 to $568,094.29. The receiver refused to resolve these conflicting claims without a decree of the court.

Thereupon Groesbeck and the American Surety Company brought suit against the receiver in the United States District Court for the District of Utah. In their complaint the payment by the American, as surety on Groesbeck's official bond, was set up and claim made by Groesbeck and the American that the American and Groesbeck were entitled to receive all dividends thereafter accruing on account of Groesbeck's claim in said bank until such time as he and the American were made whole.

The receiver answered said suit and filed his bill of interpleader praying that the National and the Massachusetts Bonding & Insurance Company, depository sureties, be required to come into court and set up their claims, if any they had. As a result the National and the Massachusetts Bonding & Insurance Company came into court as interpleaded defendants. They denied the right of Groesbeck and the American to priority in the enjoyment of dividends paid and to be paid on account of Groesbeck's claim. The National moreover asserted that the bank in its application for depository bond had agreed to indemnify and save it harmless from any loss on account of the issuance of said bond and asserted that it was entitled to have its claim theretofore filed with the receiver in the amount of its depository bond approved and allowed and receive dividends

thereon, and specifically prayed for such relief (R. 91, 92, 93).

The American answered the complaint of the National in intervention and denied that the National was entitled to have its claim based upon its alleged indemnity agreement allowed and denied that the National was entitled to receive any dividends from the receiver until after the American and Groesbeck were paid in full. (R. 95, 96).

Upon the issues thus joined the trial was had and the issues were decided in favor of Groesbeck and the American and against the National and the Massachusetts Bonding & Insurance Company. (Attention is invited to decree in first suit. R. 107).

An appeal was taken from that decree to the United States Circuit Court of Appeals for the Eighth Circuit. The Circuit Court of Appeals affirmed the judgment of the trial court. (R. 110).

After the affirmance of the District Court's decree in the former case this action was filed in the United States District Court for the District of Utah by the National, wherein it alleged that by reason of the indemnity agreement given to it by the bank at the time its depository bond was issued, it was entitled to have its claim for $120,000.00 ($5,000.00 having been assigned to the American Indemnity Company) approved and allowed by the receiver and to receive dividends thereon notwithstanding Groesbeck and the American, his surety and assignee, had not been paid in full.

Again the receiver filed his answer and bill of interpleader and prayed that Groesbeck and the American be brought in to show such reasons as they might have why the claim of the National should not be approved and allowed and dividends paid thereon. The American and Groesbeck came into this action as interpleaded defendants.

Issue was joined between all parties and a trial had. The District Court held that the subject matter of this action was fully determined and adjudicated by its prior decree and that while the National's claim should be approved and allowed this should be specifically subject to the limitation and qualification that the National should receive nothing from the receiver by way of dividends until Groesbeck and the American his assignee, had been fully repaid the sum of $223,362.15, together with interest on the sum of $200,000.00 from February 29, 1924, as provided in the prior decree, and that the qualified allowance of the National Surety Company's claim should not affect the present basis of computing and paying dividends as established by the receiver upon claims theretofore approved. (R. 51).

This case then went to the Circuit Court of Appeals of the Eighth Circuit and on March 28, 1927, that court in an opinion delivered by District Judge Phillips, concurred in by Circuit Judge Booth and District Judge J. B. Sanborn, reversed the decree of the District Court and directed the District Court to enter a decree requiring the receiver to allow the claim of the National Surety Company on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to general creditors.

The Circuit Court of Appeals held that the subject matter of this controversy was not res judicata and that even though Groesbeck and the American, his assignee and subrogee, have not been paid in full, the National, which guaranteed his whole deposit and agreed by its bond to save Groesbeck harmless and free from loss, shall be permitted to deplete the only fund out of which Groesbeck and the American can be made whole.

The suretyship aspect of this case is not discussed by the Circuit Court of Appeals in its decision. The Circuit

Court rests its ruling upon that feature of the case upon its decision in United States Fidelity & Guaranty Co., v. Centropolis Bank of Kansas City, Mo., et al., (C. C. A. 8, opinion filed February 9, 1927) 17 Fed. (2d) 913. For the convenience of the court we have printed that decision as an appendix to this brief.

The amount of approved claims against the bank at the time of the trial of this case was $1,583, 926.88. (R. 70). It follows that Groesbeck's claim in the sum of $568,094.29 (R. 67), amounts to more than one-third of all the approved claims. If, therefore, the decision of the Circuit Court of Appeals stands, the result will be that of every dollar paid the National out of the funds of the bank one-third will be received at the loss and expense of Groesbeck.

At the time of the trial the receiver had paid sixty per cent in dividends upon approved claims and estimated that at the outside he would be able to pay fifteen per cent additional. (R. 70) Under the decision of the Circuit Court of Appeals the National and its assignee will receive sixty per cent, or $75,000.00, more than $25,000.00 of which would otherwise go to Groesbeck and his assignee. It will result under the decision of the Circuit Court of Appeals that the National which guaranteed the whole of Groesbeck's deposit and agreed that it, the National, would in any event lose $125,000.00 before Groesbeck should lose anything, will by depletion of the banks assets reduce its loss from $125,000.00 to approximately $40,000.00, depending upon what further dividends may be paid by the receiver, and will at the same time leave Groesbeck, the depositor whom it agreed to protect, unpaid on account of his deposit.

The errors which petitioners urge both as ground for granting the writ of certiorari and for reversal of the decree of the Circuit Court of Appeals are:

SPECIFICATION OF ERROR

1. The court erred in holding that a depository surety of a failed bank is entitled to have its claim, based upon its indemnity agreement with such bank, allowed and dividends paid thereon before the obligee of such surety who deposited funds with the failed bank has been paid in full, where such surety guarantees the whole of such deposit without qualification or limitation save as to the penalty of its bond.

2. The court erred in holding that such surety company, after payment of the penalty of its bond, becomes, by virtue of its indemnity agreement with the failed bank, a creditor of the receiver in such a sense as to be entitled to receive pro rata dividends with those who were depositors and creditors of the bank prior to its failure.

3. The court erred in failing to hold that the decision in the first case between these parties adjudicated and disposed of the right of the National Surety Company to recover anything by way of dividends on its indemnity claim until Groesbeck was paid in full.

4. The court erred in failing to affirm and in reversing the decision herein of the District Court of the United States for the District of Utah.

5. The court erred in holding and determining that this cause be remanded with instructions to enter a decree directing the receiver to allow the claim of the National for the sum of $120,000.00 on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors including dividends heretofore paid to general creditors.

6. The court erred in holding and determining that the National is entitled to receive anything by virtue of its contract of idemnity with the bank until Groesbeck and the American, his assignee and subrogee, have been made

whole and until Groesbeck's entire deposit with the bank has been paid.

7. The court erred in following and applying to this case its decision in the case of United States Fidelity & Guaranty Company v. Centropolis Bank of Kansas City, and particularly in applying to this case the doctrine of relation back therein announced and thereby holding that the relation of debtor and creditor existed between the National and the failed bank as of the date of the execution of the bond, since "the doctrine of relation 'is a legal fiction invented to promote the ends of justice . . . it is never allowed to defeat the collateral rights of third persons lawfully acquired' ".

8. The court erred in failing to hold that as a matter of contract the bond of the National stood behind Groesbeck's entire deposit and that until that deposit has been paid in full and Groesbeck has been made whole the National can recover nothing on its indemnity agreement.

9. The court erred in failing to hold that it is the final amount left unpaid by the bank which was intended to be secured and which was secured by the National's bond, and that the National agreed to lose $125,000.00 clear before Groesbeck should lose anything, and that therefore the National ought not and cannot by virtue of its indemnity agreement, reimburse itself by receiving dividends from the bank in competition with Groesbeck, thereby depleting the only fund from which Groesbeck can be made whole, and thereby recouping itself so that it does not lose $125,000.00 clear but substantially reduces that amount by receiving moneys which would otherwise go in part as dividends to Groesbeck and his assignee.

10. The court erred in holding that the National is not barred from maintaing this action under and by reason of the doctrine of res judicata.

ARGUMENT

I.

Rights of Depository Surety: as Against Depositor Whose Entire Deposit Such Surety has Guaranteed Without Qualification or Limitation Save as to the Penalty of its Bond; and as Against Depositors and Creditors of the Bank at the time of its Failure.

The conditions of the depository bond furnished by the National to Groesbeck are as follows:

> "Now, Therefore, if the said The National City Bank of Salt Lake City, shall, at the beginning of each and every month render to the said Edward J. Groesbeck, treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Lake's moneys held by it during the month next preceding and the interest thereon, and how the same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, treasurer as aforesaid, and shall pay over the same, and any part thereof upon the check or written demand of the said Edward J. Groesbeck, treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects save and keep the said Edward J. Groesbeck, treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue." (R.63, 64)

It will be noted that the bond runs to the treasurer and is conditioned upon the bank "well and truly keeping all sums of money deposited at all times subject to the check of the treasurer". It will be further noted that the bond

indemnifies Groesbeck against loss and guarantees any and all deposits made, without qualification or limitation save only as to the penalty of the bond. The significance of this is that the bond stands behind not any particular part of Groesbeck's deposit but behind all of it so as to be guaranty against ultimate loss on account of the deposit—a guaranty of the last $125,000.00 or any part thereof. When it accepted Groesbeck's deposit, certainly the bank agreed with the treasurer to pay back the entire deposit, and the National, by its agreement with Groesbeck—its depository bond—guaranteed the performance of the bank's agreement.

In violation of the plain terms of the surety's contract with Groesbeck the Circuit Court has held that although Groesbeck has not yet been paid in full the National is entitled to have its claim allowed and to receive dividends in competition with Groesbeck at his loss and expense and is entitled to the immediate payment by the receiver of back dividends amounting to 60 per cent.

Decision Conflicts With Other Circuits

This decision of the Eighth Circuit Court of Appeals is squarely in conflict with the decision of the Fourth Circuit Court of Appeals in the case of Maryland Casualty Company v. Fouts, Lacy, State Treasurer of North Carolina, 11 Fed. (2d) 71, and the decision of the Sixth Circuit Court of Appeals in the case of Springfield National Bank et al., v. American Surety Company of New York, 7 Fed. (2d) 44, and the decision of the Ninth Circuit Court of Appeals in Fidelity and Deposit Co. v. Robinson, 7 Fed. (2d) 571.

In the case of Maryland Casualty Company v. Fouts, et al., supra, the Maryland Company executed as surety for the bank a depository bond to the State Treasurer of North Carolina, in the sum of $50,000.00, the bank execut-

ing an indemnity agreement. At the time of the failure of the bank it was indebted to the State Treasurer in the sum of $89,579.14. The terms of the National Surety Company's bond are stronger and more comprehensive than those of the Maryland Casualty Company's bond, the essential terms of which are set out in the opinion. Both bonds are general and comprehensive and are without any limitation save as to penalty and in each instance guarantee the whole of the public official's deposit. The two cases cannot be distinguished. After paying the penalty of its bond the Maryland Company brought suit claiming that by reason of such payment it was subrogated to the claim of the State Treasurer of North Carolina to that amount and also "that it was entitled to dividends as any other creditor of the bank, upon the $50,000.00" so paid by it for the bank. There, as here, the treasurer had not been paid in full; there, as here, while the surety company had paid the penalty of its bond the whole debt due the treasurer had not been discharged. The United States District Court, in that case, held "that the plaintiff is not entitled to recover from the defendant J. E. Fouts, receiver of the Peoples' National Bank of Salisbury on its indemnity agreement with the said bank." The Circuit Court of Appeals of the Fourth Circuit affirmed the decision of the District Court upon the theory primarily that to permit the Maryland Company to recover would be to allow that company to violate the very terms of its own contract.

While the surety in that case relied upon the right to subrogation, it nevertheless pleaded and relied upon its indemnity agreement, and the question of its right to recover dividends based thereon was squarely raised by the surety and squarely decided by the court.

The court held that while the surety's bond was in the sum of only $50,000.00, it nevertheless stood behind the en-

tire deposit. The court developing the point a step further held that until the entire deposit was paid, the agreement of the surety company remained unfulfilled and outstanding and *there was no ground* upon which it could participate in the assets of the bank. The point is so pursuasively developed and clearly stated by the court that we submit from its decision the following:

> "To allow the appellant to assert such indebtedness, based upon its alleged claim as a creditor for the amount paid by it under its bond of indemnity to the State, and claimed to be in full of such liability, would be to permit the assertion of a claim in behalf of a guarantor against those it undertook to indemnify, in advance of the latter being paid in full the amount due them. . . .
>
> "As long as the undertaking on account of which the security was given remains unpaid, in whole or in part, the one giving the indemnity cannot invoke the aid of a court of equity to save it from the consequence of having to make payments on account of the obligation it gave, by decreeing to it dividends from the estate of the insolvent bank, and leaving the debts of such institution indemnified against unpaid. To allow this to be done would operate most unfairly against the state, whose debt was secured. . . .
>
> "The fact of the indebtedness, on account of which the surety was given, not having been paid in full, alone required the denial of the relief praved for, as the right of subrogation cannot be availed of to collect an indebtedness by one himself liable for the debt, and which obligation he has not met. The decisions of the courts of last resort, federal and state, and the text writers of the highest standing, have given full and frequent consideration to this subject, and with one accord they sustain the views herein given. . . .
>
> "Appellant's position is purely *contractual*, and until it has met its *liability* and the state has been paid in *full*, as well for the excess deposits of $39,579.14, as for the *penal amount* of the indemnity bond, it has no right, by subrogation *or otherwise*,

in a case like the present one, to call upon others to share its burdens."

In the foregoing the court pertinently points out that the surety, while the debt it guaranteed remains unpaid, cannot be decreed dividends from the estate of an insolvent bank, since to just the extent a court of equity allows it to receive such dividends the court saves it, the surety, "from the consequence of having to make payments on account of the obligation it gave". In other words, the surety is not really suffering the penalty it contracted to pay if, while the obligation it indemnified remains unpaid, it can pay that penalty with one hand and receive back dividends to diminish that penalty with the other hand.

In the case of Springfield National Bank, et al., v. American Surety Company of New York, supra, the surety company had executed a bond to the State of Ohio as surety for the Springfield National Bank to secure a state deposit in the bank of $50,000.00. About a month later it became surety on another $50,000.00 bond executed by Penfield, cashier of the bank, for the faithful performance of his duties as such officer. The bank failed as a result of frauds of Penfield and a receiver was appointed. After the appointment of the receiver the state filed its proof of claim, which was allowed, and a certificate of allowance issued to the state and by it assigned to the surety upon payment by that company of its full liability on the depository bond. Subsequently the receiver for the bank paid to the surety company about $21,000.00 on the claim of the state.

A reading of the decision discloses that the state's claim was paid in full by the surety company's payment of the penalty of its bond. The question of whether the surety had, therefore, fully discharged its contract to the state was not involved in this case, and the question was squarely

presented as to whether or not in a suit by the receiver against the surety on the bond executed by it for Penfield the surety could set off against that liability the difference between the amount received by it on the state's claim, to-wit, $21,000.00, and what it paid to the state, to-wit, $50,000.00, as a debt due from the bank. There, as here, the bank in its application for a bond had agreed to "indemnify and keep indemnified" the surety against any loss sustained on account of the suretyship and that contractual right was there, as here, asserted. If, as held by the Eighth Circuit Court the surety company is by virtue of such indemnity agreement entitled to share with other common creditors in dividends paid, then, clearly, to that extent the surety was entitled to a set off against its liability to the bank under the bond for Penfield but the Sixth Circuit Court of Appeals denied any such right and in disposing of the asserted claim said:

> "The bank was legally bound to repay on demand the deposit made by the state. The surety obliged itself to pay if the bank should default. To permit the performance of that obligation to defeat a separate surety obligation *would eventuate in an unfair distribution of the bank's assets among its creditors.* A majority of the court think the case is within the principle announced in the Wooldridge Case."

We shall have occassion to refer to the Wooldridge Case decided by the Supreme Court of the United States hereafter.

The foregoing case by the Sixth Circuit Court of Appeals is of particular interest because it discloses the unwillingness of that court to permit any such recovery under the indemnity agreement as is here contended for even where the entire contract of the surety company had been discharged and not simply where the penalty of its deposi-

tory bond had been paid. It is further to be noted that the Supreme Court of the United States refused to grant a petition for a writ of certiorari in that case. See 269 U. S. 578; 70 L. ed. 421.

The facts in the case of Fidelity and Deposit Company of Maryland v. Robinson, 7 Fed (2d) 371, decided by the Ninth Circuit Court of Appeals, are practically identical with those of the preceding case and the right of set-off is likewise denied.

An analysis of the foregoing decisions of the Fourth, Sixth and Ninth Circuit Courts of Appeals discloses that the right to recover dividends by virtue of the indemnity agreement is denied by the Fourth Circuit Court of Appeals on the theory that to permit such recovery would violate the terms of the surety's contract; is denied by the Sixth Circuit Court of Appeals on the theory that to permit such recovery or set-off "would eventuate in an unfair distribution of the bank's assets among its creditors"; and by the Ninth Circuit Court of Appeals upon the authority of the decision by this court in the case of

United States Fidelity & Guaranty Company v. Wooldridge, 268 U. S. 234, 69 L. ed. 932.

It is submitted that the decisions in the two last cited cases by the Sixth and Ninth Circuit Courts of Appeals are as clearly in point as that by the Fourth Circuit Court of Appeals, for the reason that no distinction can be made between refusing to allow the surety's claim as such and refusing to allow a credit by way of set-off therefor.

We have reviewed the foregoing decisions by the Fourth, Sixth and Ninth Circuit Courts of Appeals at some length, both because they disclose what we conceive to be the correct legal principle here applicable and also because they serve to show the conflict between the holding of the Eighth

Circuit Court of Appeals in this case and the holdings of the Fourth, Sixth and Ninth Circuit Courts of Appeals.

This court, in Rule 35, paragraph 5, of the Revised Rules effective July 1, 1925, has set forth the character of the reasons which, while neither controlling nor fully measuring the court's discretion, will, nevertheless, be seriously considered in applications for writs of certiorari. The court has there indicated that the two following grounds, among others, will be considered:

> 1. Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.
>
> 2. Where the Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

We have shown the existence of a square conflict between the holding in this case and that of three of the other Circuit Courts of Appeals.

Moreover, the decision of the only state supreme court which has passed directly upon all the points involved in this case is in harmony with the opinions of the Circuit Courts of Appeals upon which we rely and against the opinion of the Eighth Circuit Court of Appeals.

The Supreme Court of Michigan in

Zimmerman v. Chelsea Savings Bank, 125 N. W. 424.

had before it a case involving all of the points which have been relied upon by the National, both in this and in the former case. In that case the American Surety Company as surety relied upon its contract of indemnity, as does the National in this case. It filed its claim in the sum of $50,143.40 with the receiver, and asked the court to direct the

allowance thereof and to order the payment of dividends thereon. There, as here, the surety had written a depository bond for the bank and the state treasurer relying thereon had deposited state funds therein. The bank's application for the bond contained an indemnity agreement substantially similar to that running from the bank to the National in this case. When the bank failed it had on deposit funds of the state amounting to $685,387.70, to secure which the state held six depository surety bonds, aggregating the sum of $200,000.00, included among which was the American Surety Company's bond of $50,000.00. The surety company upon the demand of the state paid the face of its bond with interest, and in its complaint in intervention urged as its fourth ground of recovery "*that the agreement of indemnity given by the bank to the surety company took effect as of its date immediately upon payment of the bond and that such agreement entitled the surety to stand as a creditor of the bank and receive its share of any dividends paid.*" In disposing of this and other claims made, the court pertinently observed:

> "The condition of the bond is that if the said bank shall, in accordance with said contract, safely keep and reimburse and pay over upon demand all moneys belonging to the said state of Michigan deposited with it by said State Treasurer in accordance with said contract, etc., 'then this obligation to be void, otherwise to remain in full force and effect.'
>
> "The language employed is not ambiguous; the ordinary meaning thereof is not doubtful. In terms the liability of the surety *is that of the principal* limited only by the penalty of the bond and by provision for paying no more than such proportion of the total loss sustained by the treasurer of the state as the penalty of this bond bears to the total of the penalties of all bonds furnished by said bank as principal in favor of said state treasurer. . . .

The debt due to the state from the bank is the sum of all deposits. The bank, the principal in the bond, has not paid the debt and upon its failure so to do the surety became at once liable to pay the amount which it had agreed to pay. The surety has paid. It paid the entire penalty of the bond because the debt due to the state from the bank exceeded in amount the aggregate of the penalties of all bonds.

. . . We reject the theory that a particular bond furnished by a depository of state funds, conditioned like the bond in question here, should be treated as securing a particular deposit of funds. And this as well when the state has the 'good and ample security' which the intervener says it should have taken as when it has not. The deposits in the Chelsea Savings bank were made, generally, from time to time, and were from time to time withdrawn. That this would be the course of affairs was to be expected, and that it was so understood is evident. All security was given and accepted for all the deposit, whatever the amount of the deposit might be. If intervener secured and intended to secure any particular deposit of $50,000.00 it had no occasion to provide that it should pay no greater part of any loss than the proportion of the penalty of its bond to the total penalties of all bonds. *Its undertaking is that its principal shall repay all moneys deposited and it must be construed as a security for the whole debt.* It is conceded, and the authorities cited by counsel for the intervener sustain the concession and the general rule, that in such a case the guarantor is not entitled to a share of the dividends which are declared and paid in reduction of the whole debt. 1 Brandt, Suretyship and Guaranty (3d Ed.) sec. 277; Ellis v. Ammanuel, Law Rep. 1 Exchcq. Div. 157; Dumont v. Fry (C. C.) 14 Fed. 293."

ANALYSIS OF CASES RELIED ON IN CENTROPOLIS BANK CASE

Since the Circuit Court of Appeals allowed the question of the respective rights of the parties herein to rest upon a reference and adherence to its opinion in the Cen-

tropolis Bank case, it becomes necessary to consider and analyze the authorities therein relied upon. As we understand it, the Circuit Court of Appeals in the Centropolis Bank case, in determining the contractual relationship of the parties and in construing the surety's bond and especially in determining the scope of its guaranty, elected, in preference to the decisions of the Fourth, Sixth and Ninth Circuit Courts of Appeals heretofore referred to, and the decision of the Supreme Court of Michigan, and numerous other decisions, federal and state, supporting the basic reasoning upon which these decisions are founded, to follow and rely upon the following cases:

American Surety Co. v. National Bank of Barnesville, 17 Fed. (2) 942;

U. S. Fidelity & Guaranty Co. v. Carnegie Trust Co., 164 N. Y. S. 92, 117 N. E. 1086;

In Re Daily and Ivins (cited by the District Court of New Jersey, not officially reported).

The case of

American Surety Company of New York v. National Bank of Barnesville, supra.

was decided by the District Court for the Southern District of Ohio. There the bank, prior to its failure, became the depository for school funds and in order to secure such deposit executed a bond, with the American Surety Company as surety, to the Board of Education in the sum of $6,000.00. The application of the bank contained the usual indemnity agreement in favor of the surety company. At the time of its failure the net indebtedness to the Board of Education was $16,030.47. Upon the bank's failure the surety company paid the full amount of its bond, $6,000.00, to the

Board of Education and thereupon filed its bill in equity asserting rights, both by way of subrogation and indemnity.

In its opinion, the court rather elaborately discusses the question of subrogation and refers to numerous decided cases on that point and then concludes that since the whole debt of the Board of Education has not been paid the surety company is not entitled to any rights by way of subrogation. It then proceeds, in the face of such a conclusion, to direct the receiver to deduct from the School Board's claim an amount equal to the penalty of the surety's bond and to allow the surety's claim for that amount, and to further direct the receiver to recover from the School Board "any and all sums paid to it as dividends upon the said amount of $6,000.00." Here then we have the anomalous situation of a court deciding that the surety could not enjoy rights by way of subrogation as a matter of law and then proceeding as a matter of fact to allow and direct that it be given such rights.

The decision of the Ohio District Court is squarely against the previous holding of the Eighth Circuit Court of Appeals in the first case between the parties to the instant suit, which denied the National any rights by way of subrogation; and which refused to in any manner reduce Groesbeck's claim or the dividends he looked to for its payment until he was fully reimbursed.

Not only is the opinion of the Ohio District Court in the Barnesville case at variance with the previous holding of the Eighth Circuit Court of Appeals in the first case between these parties, but also it is contrary to the uniform holding of the courts and is clearly erroneous. The relief granted in that case was by way of subrogation and not

indemnity. Therefore the case does not support the holding here complained of.

The case of

United States Fidelity & Guaranty Co. v. Carnegie Trust Company, supra,

likewise does not support the proposition for which it is cited by the court in its opinion in the Centropolis Bank decision, but in its result is favorable to the contention of the petitioners herein.

There the surety brought suit against the superintendent of the defunct bank, asserting that since it had paid the penalty of its depository bond to certain bankrupt creditors of the bank whose funds had been deposited there, it was entitled either to subrogation to the rights of such creditors or to have its general claim *based upon its indemnity agreement* allowed. The lower court refused to allow the surety company to share in the dividends to the injury of the bankruptcy creditors *on the ground that such action would violate the spirit of the guaranty.* On this specific point the court, at page 93, uses the following language:

> "It is not necessary to determine whether or not the claim of the plaintiff can be allowed in such a way as to *diminish* the dividends which would otherwise accrue to the bankruptcy creditors. It is contended that such effect cannot be given, *because it would violate the spirit of the guaranty.* The Special Term has so held, and has made *full provision for the protection of the bankruptcy creditors in the judgment appealed from, and from this judgment the plaintiff has taken no appeal.*"

In Re Dailey and Ivins. This is a case involving the proof of claims in a bankruptcy matter and this Court has held such a case is not in point in a case involving proof of claims against a receiver of a national bank.

> "The bankruptcy rule which requires the holder of collateral security to exhaust it and credit the proceeds on his claim, or else to surrender it, before he can prove his claim, is not adopted for national banks by U. S. Rev. Stat. 5236, providing for a ratable dividend on claims proved or adjudicated." Merrill v. National Bank of Jacksonville, 173 U. S. 131; 43 L. Ed. 640.

Section 58 (b) of the Federal Bankruptcy Act provides that secured claims shall not "be counted in computing either the number of creditors or the amount of their claims unless the amount of such claims exceeds the values of such securities and then only for such excess."

In the Dailey and Ivins case, the City of New York's claim was, to the amount of the surety bonds, a secured claim. As to that amount it could not prove its claim in bankruptcy nor could it draw dividends on the secured part of its claim. This, we submit, clearly distinguishes the case from the case at bar and discloses that it has no application here.

We urge, therefore, that the three cases cited in the court's opinion as countervailing Maryland Casualty v. Fouts and Zimmerman v. Chelsea Bank wholly fail, upon analysis, to have any such countervailing force. The Carnegie Trust case, by express reservation, leaves out of consideration the point to which it was cited by the National and an examination of the dissenting opinion discloses that the ultimate effect of the case is in our favor and against the National. The Barnesville case is one wherein subrogation and not indemnity is actually granted contrary to the opinion of the very court which granted it. The Dailey-Ivins case is a bankruptcy case governed by rules peculiar to bankruptcy practice.

II.

DECISION OF EIGHTH CIRCUIT COURT OF APPEALS ON IMPORTANT QUESTIONS OF GENERAL LAW UNTENABLE AND IN CONFLICT WITH GREAT WEIGHT OF AUTHORITY BECAUSE:

(A) Decisaon Violates the Plain Terms of the Contract Between the National and Groesbeck.

(B) National Secured Final Amount Left Unpaid by Bank.

(C) Decision Misapplies the Doctrine of Relation Back.

(A.)

To allow the National to recover anything on its indemnity agreement until Groesbeck has been made whole is to violate the plain terms of the National's guaranty to him and to reduce its liability as guarantor of his entire deposit, a liability which continued "as well after as before" the payment of the penalty of its bond.

Unquestionably the National might have become surety for the bank upon the condition that the debt it guaranteed should not exceed the penal sum of its bond or that only so much credit should be extended to the bank as should not exceed the penalty of its bond. But that is not the character of the National's bond. It involves no assumption to say that the National's bond is without limitation save as to its penalty. It guaranteed Groesbeck's entire deposit. That is precisely what the Eighth Circuit Court of Appeals held in the first case between these parties.

Upon what theory then in the face of such an outstanding and as yet unperformed contract can the National, with Groesbeck still unpaid, be allowed to compete with Groesbeck in receiving dividends from the bank? Certain-

ly the National cannot, by virtue of an independent agreement with the bank to which Groesbeck was a stranger, assert rights to any moneys by way of dividends paid by the receiver until Groesbeck has been paid in full and until the obligation of the National's bond which stands behind his entire debt or deposit has been fully performed. And yet this was the very ground asserted and relied upon by both court and counsel for allowing the National to escape from the plain terms of its contract with Groesbeck.

The National seeks to write into its depository and indemnity bond to Groesbeck the provisions of a collateral indemnity which it took from the bank and to which Groesbeck is an entire stranger. That it cannot do. The fundamental difficulty which confronts the National in seeking to have its indemnity claim allowed and dividends paid thereon is *that it comes before the court with an outstanding contract of indemnity and guaranty to Groesbeck as yet unperformed and without prospect of full performance.*

The basic error in the decision of the Circuit Court of Appeals in the Centropolis Bank case which is made controlling here, is that it wholly disregards and totally overlooks this contractual barrier to the National's right to recover. It was this contractual obligation, held not to have been performed by the mere payment of the penalty of the bond, that had controlling consideration with the Fourth Circuit Court of Appeals and the Supreme Court of Michigan.

In the case of

Maryland Casualty Company v. Fouts, supra,

the Fourth Circuit Court of Appeals, in refusing to allow the surety's claim based upon its indemnity agreement, said:

> "Appellant's position is *purely contractual* and until it has met *its liability* and the state *has been paid in full as well* for the excess deposit of $39,579.14 as for the *penal amount* of the indemnity bond, it has no right of subrogation *or otherwise* in a case like the present one to call upon others to share its burdens."

It was this contractual liability on the part of the surety company which the Supreme Court of Michigan had in mind in the case of Zimmerman v. Chelsea Bank, supra, when it denied the right to recover on the indemnity agreement there asserted and held that the surety company by paying the penalty of its bond had not discharged its full contractual obligation but that *"its undertaking is that its principal shall repay all moneys deposited and it must be construed as a security for the whole debt."*

Precisely on this point of contract, although the surety had paid the penalty of its bond, did the New York court in the case of U. S. Fidelity & Guaranty Co. v. Carnegie Trust Co., supra, refuse to allow the surety's claim based upon its indemnity agreement, without protecting the surety's obligee, since to do otherwise "*would violate the spirit of the guaranty.*"

Upon this contractual ground most courts, Federal as well as State, have refused to permit the surety, whose guaranty was without qualification or limitation save as to penalty, to enjoy subrogation until the obligee has been paid in full. The rulings in the subrogation cases to which we will refer are based upon the same construction of the surety's contract as we contend for here as barring any recovery by indemnity.

In each of the following cases the surety, having paid the penalty of its bond sought subrogation before its obligee had been paid in full. In each case the surety was met by the court with the answer that the payment of the full pen-

alty of its bond was not a complete performance of its contract.

> "The extent of subrogation depends upon the character of the bond. Unquestionably one may become a surety under a condition that the debt thereby guaranteed shall not exceed the penal sum, or that only so much of the credit to be extended to the principal as shall not exceed the penalty of the bond shall be within its protection. The surety under such a bond could become subrogated to so much of the claim against the principal, even though the creditor were thereby prevented from receiving the balance of his claim in full. We find nothing, however, in the statute that would authorize the court to accept a bond so limited. While the amount may be increased as the court may from time to time find it proper, *the object of the statutory requirement is to secure protection not for a part but for all depositors, and not for a portion but for the entire amount of their deposits; that is, for so much thereof as they may be unable to realize from the funds of the bank itself.* Under such a bond, there is no right of subrogation until the creditors shall have obtained from the principal or the surety payment not merely of the penalty but of the debtor's entire obligation."
>
> Illinois Surety Company v. U. S., 226 Fed. (7 C. C. A.) 665,

> "Was the guaranty of thewhole debt, with a limitation on the liability of the surety? *If so, the principal may retain all the dividends, and hold the surety for the residue of the debt up to the extent of the bond. Or, was the guaranty of a limited part of the debt? If so, the dividends are to be applied to the whole debt and the surety is entitled to a ratable deduction for the sum covered by the bond.* This distinction, although somewhat elusive, rests upon a logical basis, namely, *the intention* of the parties as gathered from the obligation.
>
> "*The only limitation in the bond in suit is in the amount of the penalty.* The condition, for a breach of which the penalty becomes chargeable to the sure-

ty, is the bank will repay to the plaintiff all moneys now deposited, or which may hereafter be deposited, upon call. There is no express limitation as to the amount of the deposits, and there is no ground for the inference that the deposits should not exceed the penalty of the bond. *The condition of the bond is the repayment to the plaintiff of all its deposits and the penalty becomes effective to the extent of the amount received thereof* unless the condition is fulfilled.

"The language of the bond, in connection with the admitted fact that the amount of moneys on deposit with the bank at the time of the execution and delivery of the bond was largely in excess of the penalty of the bond, indicates that the true engagement of the parties was to secure the plaintiff *for any unpaid balance to the extent of the penalty of the bond* in case of the insolvency of the bank."

Buffalo, etc. Co. v. Title Guarantee & Trust Company, 99 N. Y. S. 883.

"In the present case Bacon was not liable for the debt beyond the amount of his bond but the obligation to pay the bond was conditioned that the bank should 'well and truly keep all sums of money deposited by the city and pay over the same and each and every part thereof' so that the bond was an obligation limited to $25,000.00 but conditioned that the bank should well and truly keep all sums of money and pay over the same and each and every part thereof. *The full amount* of the bond has been *discharged by the surety but the condition expressed has not been complied with.* The bank has not well and truly kept all sums of money deposited with it and paid over each and every part thereof. *The principal liability still exists in part, though the surety has paid the penalty of the bond. This, however, did not satisfy the creditors' demands against the principal, which was to determine the liability on the bond. The amount of the liability is satisfied so far as Bacon is concerned but the cause and determination of that liability is not satisfied in full.*"

Knaffl v. Knoxville Banking and Trust Co., 133 Tenn. 655; 182 S. W. 232.

"The rights of the creditor in the mortgaged property had not been extinguished by a payment of the whole debt. The payment of the whole debt for which the surety is liable is essential to subrogation. *If the surety, upon making a partial payment, became entitled to subrogation pro tanto, and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the property was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall proportionately upon the creditor and upon the surety. Such a result would be grossly inequitable.* Yet this is in effect the result of the contention urged. The equity of subrogation does not arise from the mere obligation to pay; it springs alone from payment. The liability of the surety for the remainder of the debt continued as well after as before such payment, and until the entire debt is paid the surety has no such equity as will entitle him to the active aid of a court of equity."

Columbia Finance & Trust Co. v. Kentucky Union Ry., 60 Fed. (6 C. A. A.) 794.

"Thus it is seen that the condition of the bond was to secure the return of 'any and all sums deposited' with the bank, and not, as counsel would have it, of a sum equal to the amount of the bond.

"By the said argument of counsel the object of giving the bond would be defeated. *The situation was that the plaintiff board stood in no need of a bond for the return of whatever part of the deposits it was sure to recover from the bank either as a going concern or as a concern in liquidation;* it stood in need of a bond for that part which would be lost unless a bond was taken; that is to say, for that part not recoverable from the bank. The bond was given to supply that need. *According to the argument of counsel, it is not the balance endangered*

by the possible failure of the bank that is to be secured by the bond, but some part not in danger of being lost, so that, after the surety company has paid this part not in danger of being lost, it is to be entitled to be reimbursed by the bank. The argument will not hold water; it but renews the question long ago settled in the civil law as to what is to be the effect or operation of a bond given to secure part of the debt either already created or to be created.

"We conclude that the surety company was not entitled to come in competition with plaintiff board against the dividends to accrue from the liquidation of the bank for the reimbursement of the amount paid on the bond."

Board of Health v. Teutonia Bank & Trust Co., 68 So. (La.) 749.

"The right of a surety on a bond to be subrogated for the obligee in a right of action against one wrongfully causing the liability is founded on payment by the surety to the obligee, and it does not come into existence except upon full payment of the loss indemnified against. This is because subrogation is of an equitable character, and the surety cannot be permitted to take away from the obligee, to the latter's prejudice, securities or rights in which he is still beneficially interested. Sheldon on Subrogation, Sec. 127; Musgrave v. Dickson, 172 Pa. 629, 632, 33 Atl. 705, 51 Am. St. Rep. 765. *In this case, the loss of the state was $3,000, and the guaranty company paid it in full, but the loss of the city was $8,700, and the guaranty company has paid on account of it only* $5,700 (*as above estimated*). This leaves the city with an unpaid claim of $3,000 against the clerk and the clerk's fund, and the right of action which the city originally had against the bank it was entitled to enforce and collect and to apply the full sum collected upon its claim. *The city thus had, in a very proper sense, two securities to which it might resort and upon both of which it might realize in full until its whole claim was satisfied; these securities being its right of action against the bank and its claim against the guaranty company on the bond.*"

United States Fidelity & Guaranty Co. v. Union Bank & Trust Co., 228 Fed. (6 C. C. A., 1915) 448.

Just so in this case, the National cannot be permitted to take away from Groesbeck a part of the assets which it, under this rule, guaranteed would remain available to him. To do so would prejudice him in the enjoyment of property in which he is still beneficially interested. So, too, in this case Groesbeck, "in a very proper sense," had two securities to which he might resort—his claim against the bank and his claim against the National. The National cannot deprive him of recourse to either of these sources of relief until his claim is paid, for until that time the obligations of the bond remain outstanding and undischarged.

Finally, how can the present decision of the Eighth Circuit Court of Appeals be reconciled with the following statement in its former opinion in this same matter:

> "Until the creditor is wholly satisfied there ought to be and can be no interference with his rights and his securities which might, even by bare possibility prejudice and embarrass him in any way in the collection of the residue of his claim. (New Jersey, Etc. R. R. v. Wartendyke, 27 N. J. Eq. 658.)"
>
> "The rule deducible from the cases is, that till the creditor is paid in full, no right of subrogation exists in favor of sureties who pay a part of the debt. In short, the creditor may insist on getting his full pound of flesh before others are allowed to sit at the banquet board."

To the same effect are the following:

> People v. Peoples Bros., Inc., 254 Fed. 489;
> Fidelity & Deposit Company of Maryland v. Wilkinson, 69 So. 865;
> Dickson v. Bailey, 33 at 705;
>
> Bank of Fayetteville v. Lorwein, 88 S. W. 919;
> McKenna v. Corcoran, 61 Atl. (New Jersey Eq.) 1026

Dickson v. Bailey, 33 At. 705;
New Jersey Midland Railway Company v. Wortendyke, 27 N. J. Equity, 658.
Opp v. Ward, 24 N. E. 970;
Featherstone v. Emerson, 14 Utah 12.

As heretofore stated we must in this brief analyze the reasoning of the court in the Centropolis Bank case since the decision in that case without further comment was made controlling in this case upon the matters now under consideration. The court in the Centropolis Bank case inferentially sets aside the cases upon subrogation with the observation that it is concerned with the surety's rights not to subrogation but to indemnity. That distinction does not, however, answer either in part or in whole the argument upon which the foregoing subrogation cases are decidided, to-wit, that where the surety has not expressly limited its guaranty to the penalty of its bond although its requirement to pay may be limited by such penalty, its guaranty remains outstanding and remains a continuing contractual obligation after the penalty has been paid and until the obligee's debt or deposit is paid in full. The contract of the surety is identical whether analyzed and determined in a subrogation case or an indemnity case. Since the vital question is what is the surety's contract, what are the surety's obligations, and since these questions are analyzed and decided in the subrogation cases, the court does not with good reason in the Centropolis Bank case dispose of such subrogation cases by asserting this is a case of indemnity and not one of subrogation.

The question here is what is the contract between the National and Groesbeck? Once that is clearly determined this case is easy of solution. If we read the decisions correctly the National's contract is not simply an agreement to pay the penalty of its bond. It is also a guaranty of

Groesbeck's entire deposit. The latter obligation and the legal liability in connection therewith continued as well after as before the National paid the penalty of its bond. This has been repeatedly held in numerous decisions both State and Federal. It does not militate against the authorities here cited that some of them involve questions of subrogation as well as of indemnity. The National's contract is the same and so is every other surety company's contract the same whether that contract is reviewed in a subrogation or in an indemnity case. Insofar as the subrogation cases cited go to an analysis of what the surety cimpany's contract is and point out that such contracts embrace not simply an obligation to pay the penalty of the bond but also include a guaranty of the entire deposit, it is submitted they are in point and are entitled to the serious consideration of this court.

The authorities are overwhelming to the effect that a contract such as the National has executed is not discharged by mere payment of the penalty of the bond and that, in the language of the Sixth Circuit Court of Appeals in Columbia Finance & Trust Company v. Kentucky Union Railway, supra, "the liability of the surety for the remainder of the debt continued as well after as before such payment."

It is submitted, therefore, that to permit the National to recover under its indemnity agreement in this case does violence to the National's contract with Groesbeck guarantying the whole of his deposit and agreeing in effect that until he has been made whole the National will stand back and claim nothing to his detriment, but on the other hand will permit him first to receive all dividends which the bank can pay *and that it, the National, will thereafter make up any deficiency to the limit of the penalty of its bond.*

It is precisely this contractual ground which the Cir-

cuit Court overlooked in its decision in the Centropolis Bank case. The court in that case used the following language:

> "We think that a construction of the bond in the instant case in accordance with the above rule compels the conclusion that it was the intention of all of the parties to the contract that the Surety Company should be liable to the county for all of the principal of the county's deposit, together with interest thereon, up to and including, but not exceeding, the sum of $50,000.00 and that the recital in the bond that the penal sum thereof is $50,000, just as effectually limits the language of the condition as if there had been written into the language of the condition itself the words 'up to and including but not exceeding $50,000.' It is true that the liability under the bond was not limited to any particular portion of the whole deposit. *In that sense, the bond was security for the whole deposit, and for that reason the right of subrogation* does not exist, but the maximum amount for which the Surety Company could be held liable thereunder was expressly fixed at $50,000. The Surety Company has discharged that liability by payment in full. The county has received all that it contracted for from the Surety Company. How then can the county say that the spirit of the guaranty will be violated? *We find nothing in the language of the bond which justifies the contention that the claim of the county upon its contract of deposit should be given any priority over the claim of the Surety Company upon its contract,*"

This reasoning and particularly the concluding sentence fails to take account of the contractual barrier which has prevented the courts in all of the foregoing cases from allowing the relief to the sureties there which was allowed in the Centropolis case and which has been granted the National here. If this contractual barrier does not exisit in the present case and stand as an obstacle to the National's recovery then it is submitted that all of the foregoing cases discussed herein have been incorrectly decided.

If the National's bond guaranteed Groesbeck's entire deposit as a matter of specific contract then certainly until that specific contract has been carried out and Groesbeck's entire deposit has been paid the National is not entitled to receive anything either by way of subrogation or of indemnity.

Either the bond of the National was security for Groesbeck's whole deposit or it was not. If that bond was not security for the whole deposit but only for $125,000.00 of said deposit, then the Circuit Court in the previous case should have allowed the National to enjoy subrogation to that extent since by paying the $125,000.00 it would have paid the entire debt for which its bond was security.

If, on the other hand, the bond was, as the Circuit Court previously held, security for the whole deposit so as to prevent subrogation then that guaranty in the National's bond likewise bars it *as a matter of contract* from receiving anything by virtue of its indemnity agreement, until Groesbeck's debt has been paid in full. The same principle of contract law and the same obligation of contract is the effective bar to the surety's recovery in each instance and this, as we understand it, is the reasoning back of the decision by the Fourth Circuit Court of Appeals in the case of Maryland Casualty Co. v. Fouts and of the Supreme Court of Michigan in the case of Zimmerman v. Chelsea Savings Bank. We submit that the first decision of the Circuit Court *settled the contract question. That decision should have been held to be decisive of the present litigation, and therefore, when the Circuit Court permitted a recovery by the National under its indemnity agreement it in effect overrules its previous decision and robs the previous decision of the sound basis upon which it rests, to-wit, the proposition that the National's bond as a matter of contract guaranteed and stood behind the treasurer's entire deposit.*

The limited rights which the National has in this case spring from payment. It could enjoy no rights by way of subrogation without payment; it could enjoy no rights by way of indemnity without payment. The authorities are all to the effect that even if the National had secured no express contract of indemnity from the bank the law, upon payment, would imply such an agreement on the part of the bank. Can it possibly be that the National, seeking relief by subrogation, can be successfully confronted by the barrier of its outstanding and unperformed guaranty of Groesbeck's whole deposit, and that it can then pursue indemnity and avoid this same contractual barrier? Why should the contractual ground not be as effective and complete an obstacle to its recovery in the one case as in the other?

The same reasons and the same motives have operated in the law to raise up and confer upon a surety the rights of indemnity and the rights of subrogation. Both rights are conferred upon the surety by operation of law when to withhold such rights would be to defeat the ends of justice. The same principle which impels the allowance of recovery by way of indemnity or by way of subrogation to promote the ends of justice impels with equal vigor the denial of recovery on either ground when the recovery on either would obstruct the course of justice. A situation which has already required the court to withhold subrogation must of necessity require it to withhold indemnity.

(B.)

It is the Final Amount Left Unpaid by the Bank Which the National Secured. The National Agreed to Lose $125,000.00 Before Groesbeck Should Lose Anything. It Violates That Agreement If It Receives Anything at His Expense From the Funds of the Bank Before He is Made Whole.

As pointed out, a bond such as the National's bond, the guaranty of which is without limitation or qualification except as to its penalty, stands behind the entire deposit of the obligee. This principle is erroneously given only qualified recognition by the Eighth Circuit Court of Appeals in the Centropolis Bank case.

The National's bond stands not behind any particular part of Groesbeck's deposit, but behind all of it so as to be a guaranty against ultimate loss—a guaranty of the last $125,000.00, or any part of it. Can it be that under its bond the National may recover back out of the assets of the bank—and out of the very money that Groesbeck placed in the bank—in excess of $75,000.00 while Groesbeck, according to the record, is still out of pocket on account of his deposit many thousands of dollars? Such is the result if the decision of the Circuit Court of Appeals is allowed to stand. Groesbeck had—and still has—the right to look both to the assets of the bank and the security of the National's bond for the recovery of his entire deposit. The authorities clearly establish that it was his right to receive dividends upon his deposit from the receiver as long as dividends were available, and then to call upon the National for the residue of his debt or deposit up to the full penalty of its bond.

The fact that in this case the National paid Groesbeck

the penalty of its bond before the receiver ceased to pay dividends does not entitle the National to compete with Groesbeck in receiving dividends from the bank. Groesbeck did not need protection against loss of that part of his deposit which the bank could repay by way of dividends in the event of failure.

By its bond the National agreed to stand between Groesbeck and ultimate loss on his deposit. As long as any part of his deposit remains unpaid Groesbeck holds the National's agreement to protect him to the extent of $125,000.00. If the National is now allowed to recoup itself from the funds of the bank the inequity of such result will be apparent from the fact that the money which it receives will be taken out of the fund to which Groesbeck was entitled to look and the integrity of which the National guaranteed. As long as Groesbeck is unpaid to the extent of $1.00 the National, by the terms of its bond, is required to stand back and withhold interference with any of the securities to which Groesbeck might resort. Otherwise the National does not lose the $125,000.00 as it has agreed, and just to the extent to which it minimizes its loss at the expense of Groesbeck it is relieved from the obligation of its contract.

There are many cases to support this contention, and except for the decision of which we now complain we know of no respectable authority to the contrary.

Observe

Knaffl v. Knoxville Banking & Trust Co., supra wherein the Supreme Court of Tennessee says:

> "Had it chosen to do so the city might have deferred action on the bond until it had received the last dollar from the receiver and then it could sue the surety on the bond and recover the full amount of the penalty, not exceeding the total debt unpaid. But the city did not have to exhaust the assets of

the principal before a recovery from the surety. The fact that it recovered judgment and received payment from the surety before exhausting the principal does not alter the case. . . .

"The fault in the reasoning is readily seen when it is considered that the obligee may first apply all that the principal—obligor, can pay and then resort to the bond for any amount left unpaid, not exceeding the amount of the penalty *for it is the final amount left unpaid by the principal which is intended to be secured by the surety.*"

In Merrill v. National Bank of Jacksonville, supra, this court supports the contention made herein that the security furnished by the National stands between Groesbeck and ultimate loss, in the following language:

"Certainly the giving of collateral does not operate of itself as a payment or satisfaction, either of the debt or any part of it, and the debtor who has given collateral security remains debtor, notwithstanding, to the full amount of the debt. . . .

"In short, the secured creditor is not to be cut off from his right in the common fund because he has taken security which his co-creditors have not. Of course, he cannot go beyond payment, and surplus assets, or so much of his dividends as are unnecessary to pay him, must be applied to the benefit of the other creditors. And while the unsecured creditors are entitled to be substituted as far as possible to the rights of secured creditors, the latter are entitled to retain their securities until the indebtedness due them is extinguished.

"We can not concur in the view expressed . . . that 'the property pledged is in fact security for no more of the debt than its value will amount to; and for all the rest the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole if no security were taken.'

"*We think the collateral is security for the whole debt and every part of it, and is as applicable to any balance that remains after a payment from other*

sources, as to the original amount due; and that the assumption is unreasonble that the creditor does not rely on the responsibility of his debtor according to his promise."

In

Buffalo, etc. Co. v. Title Guarantee & Trust Company, supra,

the holding of the New York court is tersely set forth in the syllabus:

'Held that plaintiff was entitled, after deducting the whole sum received as dividends from the bank's assets from the gross amount of the deposit, *to recover from the guarantor the residue of the debt up to the penalty of the bond."*

See also

Peoples v. Peoples Bros., 254 Fed. 489;
American Surety Company of New York v. Finletter, and Massachusetts Bonding & Insurance Company v. Finletter, et al., 274 Fed. 152;
U. S. Fidelity & Guaranty Co. v. Union Bank & Trust Co., 228 Fed. 448.

C

DOCTRINE OF RELATION BACK ERRONEOUSLY APPLIED.

The holding that the National may receive dividends from the assets of the bank before Groesbeck is paid in full was made to rest in this case upon the decision of the Circuit Court of Appeals in United States Fidelity & Guaranty Company v. Centropolis Bank, supra. In that case the court held that a depository surety upon the paymen of the penalty of its bond is entitled to compete with the depositor whom it securès even before the depositor is paid in full.

This conclusion was reached by resort to the so-called doctrine of relation back.

As applied to this case that doctrine means that while the National did not pay the penalty of its depository bond until several months after the failure of the bank, nevertheless the relation of debtor and creditor existed from the time the bond was executed and that upon payment of the penalty all rights growing out of such payment related back to the date of the execution of the bond. The court held that this doctrine applied in this case with such force as to give the National the character of a creditor of the bank as of the date it executed its depository bond to Groesbeck and to clothe it with the right to compete with Groesbeck in the assets of the failed bank even before Groesbeck is made whole.

Any rights which the National has against the receiver arise from the contract between the National and the bank and to that agreement Groesbeck was not a party. As to that agreement Groesbeck is a third person who has acquired lawful rights against both parties thereto. The bank as principal and the National as surety agreed to protect Groesbeck from loss. We contend the doctrine of relation back cannot be applied in favor of the National so as to deprive Groesbeck, an innocent third person, of the rights he had acquired against the National and the bank.

The right of relation back is not one which the surety may enjoy at all events. It "is a legal fiction invented to promote the ends of justice, * * * and it is never allowed to defeat the collateral rights of a third person lawfully acquired." It is invoked by courts of equity to assist only in cases when the withholding of its application would defeat the ends of justice.

In holding that the right of relation back is available to the surety at all events, the Circuit Court of Appeals, we submit, departed from the law as settled by this court in

United States Fidelity & Guaranty Company v. Wooldridge, supra.

In the Wooldridge case the surety company furnished a depository bond to the Gulf, Colorado and Santa Fe Railroad to secure the railroad against loss on account of its deposit in the Cleburne National Bank. The surety company had also furnished a fidelity bond to the Cleburne Bank to protect the bank against the misconduct of its cashier. The bank failed and the surety paid the Railroad the amount of its deposit for which it took an assignment of the Railroad's claim against the Bank's receiver.

Suit was brought by the receiver against the surety on the fidelity bond. In that action the surety relied upon its rights arising from the payment of the depository bond and attempted to set off such payment against the receiver's claim on the fidelity bond. In support of its claim to the set-off the surety company relied upon the doctrine of relation back. If, as the Circuit Court of Appeals held in this case, the doctrine of relation back is available to the surety at all events, the claim of set-off in the Wooldridge case would have been a good defense. This court, however, rejected the application of the doctrine and in concluding its opinion said:

> "The doctrine of relation 'is a legal fiction, invented to promote the ends of justice, and * * * it is never allowed to defeat the collateral rights of third persons lawfully acquired'."

This Court's opinion in the Wooldridge case finds support in a prior opinion:

Johnston v. Jones, 1 Black, 209, 17 L. Ed. 117, wherein this court says in part:

> "The counsel for the plaintiff in error insists that the deed from Robert A. Kinzie to Johnston related back to the date of the title bond from Kin-

> zie to Hubbard, and that this was a new element in the case, which required a change of the rule, as to the point of time to which the attention of the jury should have been directed. We do not think so. The doctrine of relation cannot be made to work such a result. *It is a legal fiction, invented to promote the ends of justice. It is a general rule, that it shall do no wrong to strangers.* It is applied with vigor between the original parties, when justice so required; but *it is never allowed to defeat the collateral rights of third persons, lawfully acquired.* Jackson v. Bard, 4 Johns. 234; Case v. DeGoes, 3 Cai. 262; 18 Vin. Abr. 287, Relation, B: Menvil's case, 13 Coke, 21; Wood v. Ferguson, 7 Ohio St. 291."

The holding of this court upon the doctrine of relation back has been followed by the Supreme Courts of North Dakota, Minnesota and Michigan and by the Circuit Courts of Appeals for the Sixth and Ninth Circuits. We have been unable to find any case except the Centropolis Bank case where a court has permitted the application of the doctrine to interfere with the rights of innocent third persons. The Sixth Circuit Court of Appeals in

> Springfield National Bank v. American Surety Co., supra,

had before it a case where the surety company undertook to set-off a claim of indemnity growing out of the payment of a depository bond against a claim asserted by the receiver of a failed bank on a fidelity bond.

In that case, as in the case at bar, the bank in its application for the bond agreed to "indemnify and keep indemnified" the surety against any loss sustained on account of the execution of the depository bond and that agreement was asserted in that case just as it was asserted in this case. It is significant, however, that in the Springfield National Bank case the surety had not only paid the pen-

alty of its depository bond, but the entire claim of the depositor. That case presented a situation where the entire loss indemnified against had been met, but even then the court refused to apply the doctrine of relation back. The court in that case held that the surety company's "potential liability on the depository bond was converted into a claim against the bank when and not until the bank becomes insolvent and unable to repay the state." The court further said:

> "To permit the performance of that obligation—payment of the deposit bond—to defeat a separate surety obligation would eventuate in an unfair distribution of the bank's assets among its creditors."

The Ninth Circuit Court of Appeals followed the same reasoning and reached the same result in

> Fidelity & Deposit Company of Maryland v. Robinson, supra,

In

> Storing v. Stutsman, 210 N. W. (N. D.) 653,

Stutsman was required to respond to the City of Mandan on a depository bond on which he was surety. He was sued by the receiver of the failed bank upon a note held by the receiver and pleaded his payment upon the depository bond as a set-off. His contention that the doctrine of relation back gave him the character of a creditor of the bank as of the date he executed the bond was rejected by the North Dakota Court in the following language:

> "The difficulty arises when it is attempted to apply the principle to the facts in the manner and with the effect urged by the defendant. The surety may unquestionably compel the principal to perform the obligation when due; but, in the case at bar, he could not under his contract or under the statutes compel the bank to pay or the city to receive the deposit before it came due or before demand by the

city. There was no demand by the city before insolvency; immediately when the bank became insolvent, the deposit was due and the rights of the defendant as surety became fixed. However, at the same moment of time, the rights of creditors and the receiver became fixed and the federal statute intervened, raising a barrier against any disposition of the assets of the insolvent constituting a preference, as therein defined. . . .

"The surety is, of course, an original promisor from the beginning; and, in the ordinary meaning of that term, his liability is no more secondary than is that of the maker of a promissory note. The city of Mandan, however, had and could have no right of action against the defendant until the principal had failed, upon demand, to repay the deposit; that failure took place, and, consequently, the cause of action in behalf of the city and against the defendant came into being at the moment when insolvency took place; and, at the same instant, the rights of creditors of the principal to a distribution of its assets without discrimination or preference became as absolutely fixed as the rights of the defendant which flowed from the suretyship relation. . . .

"*It solves nothing to cite the equitable doctrine of relation. That legal fiction originated in a desire to do justice, and resort cannot be had to it when the result is to defeat the rights of third persons lawfully acquired.* Gilbertson v. Northern Trust Company, supra. *The question on which the instant case turns can be correctly answered only by an examination of the rights of the surety and a determination of the point of time when they became fixed. If the surety had a right to a set-off which had accrued or become fixed prior to insolvency, it would in no manner be affected by the bank's closing its doors. Suppose that, prior to insolvency the bank had sued the defendant on the notes in suit and while the city of Mandan was a depositor, but before demand or refusal to repay the deposit; could he have set up his primary obligation, as he describes it, on the bond to defeat, reduce or delay recovery on the notes? - Clearly not.*"

Of like import is the case of

Veigel v. Converse, 210 N. W. 162,

wherein the court in rejecting the application of the doctrine said:

> "The starting point for decision is the proposition that, when a bank becomes insolvent and goes into the hands of a receiver, 'the respective rights and liabilities then existing between it and its creditors and debtors become fixed' and its net assets, after satisfying the claims of preferred creditors, if any, are subject to 'disposal and ratable distribution among all its general creditors, upon the principle of equality. No subsequent lien can be created, or *right* or preference obtained.' Balch v. Wilson, 25 Minn. 299, 33 Am. Rep. 467."

See also the strong statement of the Supreme Court of North Dakota in

Gilbertson v. Northern Trust Co., 207 N. W. (42).

> "The purpose of such relation, however, is to do justice between principal and surety; to give to the surety, who discharges the principal's obligation, any rights and remedies which the obligee had as against the principal during the time that the surety contract was in existence. But this theory of relation cannot be invoked to do injustice as against third parties."

Zimmerman v. Chelsea Savings Bank, supra,

is a case upon which we place great reliance because of the fact that in it all of the points urged by the National both in this and in the former suit between these parties and also all the points advanced by the Circuit Court of Appeals in its opinion in the Centropolis case were raised and decided. The fourth point there urged by the surety company in support of its claim to the right to share pro rata in the assets of the failed bank reads as follows:

> "Fourth, That the agreement of indemnity given by the bank to the surety company took effect as of its date immediately upon payment on the bond, and that such agreement entitled the surety to stand as a creditor of the bank and receive its share of any dividends paid."

The Supreme Court of Michigan, however, refused to apply the doctrine of relation back in that case.

The holding in the cases just cited to the effect that the date of insolvency of the bank is the date to which resort must be had in fixing claims against the receiver finds support in the case of Merrill v. National Bank of Jacksonville, supra, wherein this court in part says:

> "The distribution is to be 'ratable' on the claims as proved or adjudicated, that is, on one rule of proportion applicable to all alike. In order to be 'ratable' the claims must manifestly be estimated as of the same point of time, and that date has been adjudged to be the date of the declaration of insolvency."

The holding that the doctrine of relation back is a legal fiction invented to promote the ends of justice and will never be allowed to work an injustice against innocent third parties becomes at once applicable to this case when the court understands that not only has Groesbeck and the American, his assignee and subrogee, not been made whole but likely never will be.

It is unjust for Mr. Groesbeck, who is liable to the American Surety Company for the final deficit herein, to have this case decided upon authority of the Centropolis Bank case. The doctrine of relation back though erroneously applied was applied in the Centropolis Bank case with less violence to the equities of Jackson County than will be the case with Groesbeck if applied here. Jackson's Coun-

ty's deposit was $122,324.59. It received $100,000.00 from depository sureties and had its claim against the receiver allowed for the full amount. Dividends amounting to as little as 20 per cent on that claim would wholly repay Jackson County. The situation in which Groesbeck finds himself is much more unfortunate. Jackson County will doubtless be paid in full even in the face of the application of the doctrine of relation back, while Groesbeck, in the fact of such application, is certain to lose many thousands of dollars.

If by recourse to the doctrine of relation back the National is to be permitted to now recover $75,000 of the $125,000 paid on account of its bond, while Groesbeck is still unpaid, then the doctrine of relation back will have been employed not to promote the ends of justice but to absolve the surety company from the obligation of its contract and to "defeat the collateral rights of third persons, lawfully acquired."

Only by the erroneous application of the doctrine of relation back could the court reach its conclusion in the Centropolis Bank case. Since that doctrine can have no application to such a case as this it follows that with the rejection of the doctrine the decision herein must be reversed.

The National was not a creditor of the bank at "the date of the declaration of insolvency" and since this court has held that that is the controlling date, the Eighth Circuit Court of Appeals erred in holding that the National can share with those who were creditors and depositors upon that date. Herein lies the fundamental error in allowing the National to share with those who were general creditors and depositors at the time the bank closed its doors.

III.

COURT'S DECISION WILL RESULT IN UNFAIR DISTRIBUTION OF BANK'S ASSETS AMONG ITS CREDITORS IN VIOLATION OF NATIONAL BANKING ACT.

The National Banking Act (R. S. 5236 Sectioin 194, New U. S. Code, Annotated) requires that dividends to creditors of the bank shall be ratable and without preference. The penalty of the National's bond never went into the assets of the bank for ratable distribution to its creditors and if the decision of the Circuit Court of Appeals shall finally result in payment of dividends to Groesbeck on the full amount of his deposit and also upon the full amount of his depository bonds, then there is to be paid on account of Groesbeck's deposit an amount disproportionate and unfair to general creditors. Such decision establishes a preference in favor of Groesbeck's deposit to the detriment of other depositors of the bank and violates the intention of Congress as expressed in The National Banking Act.

At the time the bank failed Groesbeck had on deposit the sum of $643,094.29 for which amount (less $75,000.00 assigned to Fidelity and Deposit Co.) he was entitled under the law to have his claim allowed and approved. He was entitled to receive dividends on the full amount without regard to any collateral which he held. Merrill v. National Bank of Jacksonville, supra.

But, if his depository sureties, after the insolvency of the bank, are entitled to pay the penalties of their bonds and then receive dividends pro rata on the amounts paid, the effect will be that Groesbeck's deposit will draw dividends from the assets of the bank upon its full face value, plus the amount of any depository bonds which he held.

This would give his deposit a dividend earning capacity proportionately greater than the dividend earning capacity of other deposits, resulting in a preference against depositors in general and an unfair distribution of the bank's assets.

Clearly to allow the National Surety Company to recover upon its indemnity agreement will "eventuate in an unfair distribution of the bank's assets among its creditors." A simple case will serve to illustrate the situation. Assume ten individuals constitute all the depositors in a bank upon its failure and that each of the ten has $10,000.00 upon deposit. One would naturally assume under such a state of facts that each of the ten depositors would share equally in and receive one-tenth of the dividends paid by the receiver. If, however, one of the depositors was a custodian of public funds, as in this case, and had taken the precaution to secure a depository bond, then that $10,000.00 deposit under the decision in this case, would receive dividends not simply on such $10,000.00 deposit but also would receive dividends on the additional amount paid in connection with such deposit under the depository bond. In other words, that $10,000.00 deposit, if the depository bond were in the sum of $5,000.00, would draw dividends based on once and a half the amount of the deposit: first, upon the depositor's claim, and, second, upon the indemnity contract. The result would be that the other nine depositors would not receive the proportion of the dividends paid which their deposits bear to the total of bank's deposits; and where, as in this case, the depository bond is for a large sum, the "unfair distribution of the bank's assets among its creditors" becomes even more disproportionate. If the law of this case is permitted to stand, the liabilities of a bank will not have a direct relation to its deposits, and depositors will not share equally and in proportion to their

deposits, but dividends will be distributed on the basis of deposits plus liability by virtue of indemnity agreements given by the bank in connection with depository bonds.

Appreciation of this resulted in the Sixth Circuit Court of Appeals in the case of Springfield National Bank v. American Surety Company of New York, supra, holding that to allow the claim of the depository surety "would eventuate in an unfair distribution of the bank's assets among its creditors."

IV.

DECISIONS OF EIGHTH CIRCUIT COURT OF APPEALS IN THE TWO CASES INVOLVING THIS SAME MATTER CONFLICT.

The decision of the Circuit Court of Appeals of which we complain is in conflict with its decision in the former case between these same parties involving this same fund.

By the decree in the first case it was held that the American, as assignee and subrogee of Groesbeck, should receive all dividends accruing on account of Groesbeck's claim until the American and Groesbeck were made whole; that until such time the National should receive nothing.

The National argues that the first decree does not specifically and in so many words deny its right to participate in the assets by force of its indemnity agreement. But the Circuit Court's decision in the first case affirmed the District Court's decree denying the National the right to in any manner deplete the funds out of which Groesbeck and the American were to be made whole until they had been paid in full. Any other construction renders the first decree ineffectual to accomplish its purpose. If the first decree prevented participation in the funds by the National until Groesbeck and the American are made whole, it would

be ineffectual if it left a way open for the National to enter by any other avenue and thereby deplete the funds in the hands of the receiver to Groesbeck's and the American's detriment. We contend that the first decree denied the National the right to participate in the funds in the hands of the receiver until Groesbeck and the American were wholly paid, while the present decision of the Circuit Court authorizes the National to compete with Groesbeck and the American in the enjoyment of the same fund.

If we are correct in this position then it becomes at once apparent that both decisions cannot be given full force and effect and if the second decision is to become final, the effect of its becoming final is to nullify its first decision. The first decree, affirmed by the Circuit Court, became final before this case was filed and the Circuit Court of Appeals had no jurisdiction or power to thereafter reverse or modify it.

There is a second ground of conflict between the first and second decisions of the Eighth Circuit Court in this matter. The second decision in this case, as well as that in the Centropolis Bank case, is opposed to fundamental principles of suretyship law which were recognized and approved by the Eighth Circuit Court of Appeals in its first decision, and to that extent and in that respect the second decision is squarely in conflict with the previous decision of that court in this same matter.

It is well established that the rights of a surety can never rise above those of its principal:

> "The surety has no rights superior to those of the principal and cannot enforce a lien which the latter could not have enforced." (37 Cyc. 429).
>
> "The surety cannot be placed in a more favorable position than the principal." (37 Cyc. 429).

In the first decision by the Eighth Circuit Court of Appeals between these parties that court in its opinion affirmed the foregoing principles and in that connection observed (R. 115):

> "Obviously the Bank cannot complain of its own fraud nor can its surety for ordinarily 'a surety cannot be placed in a more favorable position than the principal'." (37 Cyc. 429).

The application of this principle to the present situation is fatal to the claim of the National that it is entitled to dividends upon its indemnity agreement with the bank before the Bank has paid to Groesbeck the whole of his deposit. As between Groesbeck and the bank there can be no argument as to the treasurer's superior right to be paid in full from the assets of the bank before the bank can claim anything for its stockholders, and since the National, as surety, cannot be placed in a more favorable position than its principal *this case is effectually reduced to the simple proposition that the National cannot enjoy rights with respect to moneys available for dividends if the bank could not enjoy them.* The National is, therefore, in effect, arguing in this case that to the extent of its claim for dividends, under its indemnity agreement, the bank *has a right to share with Groesbeck in the moneys available for paying dividends; and this before Groesbeck has been paid in full.*

The bank not only guaranteed payment to Groesbeck of his deposit, but indemnified him against loss on account thereof. Once this case is reduced to its simplest terms it is found, by application of the foregoing principle, to be nothing more than a contest between the bank and Groesbeck, with the National asserting rights under a contract with the bank, superior to what the bank itself could assert. If the National cannot be placed in a more favorable

position than its principal, the bank, then it would seem clear that the National cannot assert rights to any dividends by virtue of its indemnity agreement with the bank until Groesbeck has been paid in full.

V.

RES JUDICATA

The Circuit Court of Appeals erred in holding that the subject matter of this suit had not been adjudicated in the first suit between the same parties. Its conclusion on this point is embodied in the following language:

> "The cause of action asserted by the National Company in the former suit was predicated upon its alleged right of subrogation. The cause of action sought to be enforced by the National Company in this case is predicated upon its contract of indemnity. It is a cause of action which is wholly independent of, and entirely separate and distinct from, the alleged cause of action asserted by the National Company in the former suit. Since the National Company seeks relief in the instant case upon a different and distinct cause of action from the one asserted by it in the former suit, the judgment in the former suit is conclusive only as to such points or questions as were actually in issue and adjudicated therein."

In its opinion upon this point, however, the court says that:

> "It is true that the National Company, in its answer in the former suit, alleged the contract of indemnity, and prayed that its claim thereon against the receiver be allowed and approved. But such claim was not a proper subject for litigation in the former suit. It was the subject of an independent suit by the National Company against the receiver. The American Company so contended in its brief on appeal in the former suit. Since it is a matter which could not properly have been litigated, and was not actually litigated, and was not necessarily

> determined by the decree, in the former suit, it is not concluded by that decree *although it was put in issue by the pleadings.*"

In this action the National relies upon an alleged right to indemnity, the basis for which is an agreement, made with it by the bank at the time its depository bond was issued, to the effect that the bank would save the National harmless by reason of the execution of the bond. In the first suit this same agreement was pleaded and in its prayer the National asked that its claim based upon that indemnity agreement be allowed and approved and the receiver directed to pay dividends thereon.

The National's appeal to the Circuit Court of Appeals from the decree in the first case contains the following assignment of error:

> "The claim of this appellant arising out of said contract with said bank should have been allowed and approved by the trial court, and the receiver directed to pay to it dividends thereon." (Assignment of error No. 8, R. 126).

In support of that assignment of error the National in its brief to the Circuit Court of Appeals said:

> "*However*, we wish to say at the outset of this argument, and most emphatically, that *we rely foremost and primarily* upon our legal right of reimbursement, based upon the rights acquired and reserved by this appellant and given to it by said Bank as the inducement and consideration of its execution of said bond." (R. 143)

After the decree in the first case had become final, the National refiled its claim with the receiver. This refiled claim omitted to assert subrogation, which was urged originally, but the indemnity agreement and the payment relied upon in the refild claim was the same indemnity agreement and the same payment relied upon when the

claim was originally filed. The parties so stipulated. (R. 122) There was only one indemnity agreement and only one payment. When the National pleaded its idemnity agreement in the first suit, the American and Groesbeck denied the right of the National to have its claim allowed or to receive dividends thereon by reason of such indemnity agreement. Upon the trial of the first suit the indemnity agreement was received in evidence and relied upon both at the trial and upon appeal.

We thus have the National Surety Company pleading and relying upon the same indemnity agreement in the first suit that is pleaded and relied upon in the second suit, and in both suits issue was joined with the National upon its asserted claim to the right to draw dividends on account of said agreement.

Our contention that the National's rights under its indemnity agreement were adjudicated in the first action and that the decree in the first case is a bar to a subsequent suit upon the same indemnity agreement is, we think, amply supported by the authorities.

This court in

Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195

in part said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every

matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example; a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defense actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever."

The parties to this suit and in the former suit are the same. The National in the former case alleged the same indemnity agreement it relies upon here. It prayed for the same relief in the former case for which it prays here. It offered in the former case exactly the same evidence in support of its right to indemnity which it offers here. There is, therefore, in the two suits an identity of parties, an identity of claims asserted and an identity of proof to support the claims. It may be asserted that it was not necessary in the former action to adjudicate the National's rights under its alleged indemnity agreement. As we have pointed out elsewhere herein, however, it was necessary to determine the rights of the National under its alleged indemnity agreement in order to make the adjudication of all the issues in-

volved in the former suit complete and to make the decree rendered efficacious.

There is here present every element which has lead courts to a finding of identity of causes of action in cases involving res judicata.

We invite the attention of the court to the statement of the law upon the subject as found in the following:

> "The allegations, it is true, are general, but they were sufficient had the petitioner so desired, to permit the introduction of testimony, including the record of proceedings before the immigration authorities and to allow his discharge if petitioner were entitled to relief on any of the grounds now urged * * *
>
> "According to the general principles of the doctrine of res adjudicata, a former judgment is a bar not only as to matters actually argued and decided, but also as to all other matters which might have been put in issue, argued and decided." Wong Sun v. Fluckey, 283 Fed. 989 at 991.
>
> "The petitioner had full opportunity to offer proof of it at the hearing on the first petition, and if he was intending to reply on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition if the first failed, was to make an abusive use of the writ of habeas corpus. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time." Wong Sun v. Fluckey, 283 Fed. 989, 265 U. S. 239, 68 L. Ed. 991.
>
> "The pleadings and judgment in the prior suit are not set out in this record, but it appears from the opinion of the trial judge that they were before and considered by him. From the pleadings before us the facts concerning that litigation are not in dispute except with respect to the ground upon which the court based its action in sustaining the demurrer, and we are able to consider the point urged as

fully as though the proceedings were fully set out in the records. . . . .

" 'A general judgment or decree of dismissal, without more, renders all the issues in the case res adjudicata and constitutes a bar to any subsequent suit for the same cause of action. Hence, when a court dismisses a suit upon some ground which does not go to the merits of the cause of action, but leaves them open to consideration in another court, or at another time, or in another way, the decree of dismissal must expressly adjudge that it is rendered for the specific reason upon which it it based, or must expressly provide that it is made without prejudice.' Fowler v. Osgood, 141 Fed. 20-24, and cases cited.

" 'It is well settled that a valid final judgment or decree, upon the merits, constitutes an absolute bar to a subsequent action or suit between the same parties upon the same claim or demand. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Except in special cases, the plea of res adjudicata applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. . . . The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the groundwork upon which it must have been founded. . . .

" 'A former judgment on the merits estops the parties thereto not only as to every ground of recovery which was actually presented in the action in which it was rendered, but also as to every ground which might have been presented. Thus, where the plaintiff in an action claims the right of property in a certain thing, the only question involved is whether the property in question belongs to him or not, and

> if the action results in favor of the defendant, it will bar any action against the same party for the same property, although the plaintiff failed to set up all the rights upon which he might have relied to maintain his cause of action. So also the judgment in an action to quiet title is conclusive of the title, whether adverse to the plaintiff in the action or to the defendant. In other words, it determines the merits of the plaintiff's title as well as that of the defendant.'" Hickey v. Johnson, 9 Fed. (2d) 498 (8 C. C. A.).
>
> "The test of the identity of the causes of action is the identity of the facts essential to maintain them." Hotellet v. Garden City Milling Company, 285 Fed. 693 (8 C. C. A.).

The foregoing decisions, in our judgment, state the law upon the subject and are in conflict with the conclusions reached in this case by the Circuit Court of Appeals.

The Circuit Court rested its decision upon the ground that the claim of the National in its first suit based upon its indemnity agreement "was not a proper subject for litigation in the former suit." The court in the same paragraph goes on to assert that the National "is not concluded by that decree" since its indemnity claim "is a matter which *could not properly* have been litigated" and the National is, therefore, "*not concluded by that decree* although it (the indemnity claim) *was put in issue by the pleadings.*"

Why was the National's claim, based upon its indemnity agreement, "not a proper subject for litigation in the former suit," and why was it a matter "which could not properly have been litigated" therein. The same parties were there as here; the Court had jurisdiction not only of them but of the subject matter as well, and had the jurisdictional power and right to hear and decide the cause of action there pleaded, based upon the indemnity agreement.

In the Centropolis Bank case the Surety relied in one action upon both subrogation and indemnity. The Circuit

Court in that case did not hold that the indemnity agreement was not a proper subject of litigation but on the contrary recognized it as properly before the Court and granted relief under it.

Courts of equity boast that they never do things by halves, and that having once taken jurisdiction of a controversy they will retain jurisdiction until the entire controversy between the parties has been disposed of. In accordance with this well recognized equitable principle, it has been the common practice in cases of this character for surety companies to assert at the same time and in the same suit not only rights by way of subrogation but rights by way of indemnity as well. That is what was done in Maryland Casualty Co. v. Fouts, supra, in Zimmerman v. Chelsea Savings Bank, supra, and in the case of American Surety Co. v. Barnesville Bank, supra.

Upon what theory can it be held that although the National's indemnity claim "was put in issue by the pleadings" in the first case that nevertheless "such claim was not a proper subject for litigation in the former suit?"

Since the decision complained of concedes that the National's claim, based upon its indemnity agreement, was "put in issue by the pleadings" in the first case, and since the same evidence was offered there as here, the same relief prayed for there as here, and since that cause of action is identical with the cause of action here sued upon, and since the parties to this suit were parties to the original suit, and since the court in the original suit, as in this suit, had jurisdiction of both the parties and the subject matter, it is submitted that the decree of the District Court in the first case renders that claim *res judicata* between these parties.

The District Court in holding this matter *res judicata,* used the following language:

"It seems to me clear, notwithstanding the theory relied upon by the plaintiff in this action to distinguish it from the former case, that the subject matter of the litigation is the same and that the former case has disposed of the subject matter definitely and that nothing is left to be disposed of in this case otherwise than therein determined.

"In that case the Circuit Court of Appeals affirmed the judgment of this court giving priority of payment to the American Surety Company of the amount due it through Mr. Groesbeck *before the plaintiff in this case can be paid anything.*

"Now you cannot change the decree by changing the theory of your cause of action. The subject matter of this obligation has been disposed of." . . . . (R. 210).

"As already said, by the decree in the former suit no funds are available for the liquidation of the plaintiff's indebtedness until Mr. Groesbeck as treasurer, or his guarantor, the American Surety Company, has been made whole. That judgment must stand." (R. 211).

Moreover, the National on the first appeal in this case, and in its petition for rehearing, placed the very construction upon the original decree which the District Court has placed upon it in deciding the present case, and argued that the District Court then erred in denying its claim based upon its indemnity agreement.

Even if it should be asserted that the issue with respect to the indemnity claim was not in terms passed upon by the District Court in the first case, if, nevertheless, as admitted in the decision complained of, that claim "was put in issue by the pleadings," it is respectfully submitted that the matter is nevertheless res judicata between these parties under the holding of the Eighth Circuit Court of Appeals in

Commercial Electric Supply Co. v. Curtis, 288 Fed. 657 (certiorari denied 263 U. S. 709):

"A final decree or judgment of a court between

> parties to a suit therein, of whom and concerning the subject-matter of which it (the court) has jurisdiction renders not only every claim and defense which they made and obtained a decision of, *but also every claim and defense that they might have made and that the court might have decided in that suit res adjudicata between them.*"

Since the indemnity claim "was put in issue by the pleadings" in the first suit, it is submitted that the decree in that case is conclusive "as to every question which was or might have been presented and determined in the former suit" including the claim now relied upon by the National.

CONCLUSION

It is respectfully submitted that this court should issue the writ herein prayed for and bring this case before it for review because:

1. The decision complained of is in conflict with the decisions of the Fourth, Sixth and Ninth Circuit Courts of Appeals wherein identical questions were raised and decided and an opposite result reached.

2. The decision involves a matter of great general and public interest, and the correct rule for the guidance of the Comptroller of the Currency in liquidating failed national banks and distributing their assets should be established by this court. The problem not only affects the Comptroller of the Currency but banks, surety companies and bank depositors as well.

3. The decision complained of involves a ruling upon important questions of general law that are untenable and that are contrary to the great weight of authority.

4. The decision conflicts with the previous decision of the same Circuit Court of Appeals involving the same parties and the same fund, and it is impossible to comply with both decisions. They cannot be reconciled.

5. The decision complained of involves the construction of the National Banking Act and the distribution of the assets of failed banks thereunder.

This court, upon reviewing the decision complained of, should reverse this case because;

1. The subject matter of the present suit is res judicata.

2. The decision of the Centropolis case which is adopted herein involves an erroneous application of the doctrine of relation back permitting the National, which was not a creditor at the time of the failure of the bank, to share with those who were depositors and creditors of the bank at that time and results in an unfair distribution of assets.

3. The decision permits the National, in violation of its contract, to compete with Groesbeck in the enjoyment of the dividends while its guaranty to him is still outstanding and unperformed. The decision fails to hold the National to its guaranty of Groesbeck's entire deposit and overlooks the proposition that it is the final amount left unpaid by the bank which the National secured. The decision relieves the National from the payment of the full penalty of its bond and the National is thus discharged from its contractual obligation not by performance but by the decree of the court.

Respectfully submitted,

EMMETT M. BAGLEY,
ROBERT L. JUDD,
PAUL H. RAY,
Solicitors for Edward E. Jenkins, Receiver, Petitioner
A. M. CHENEY,
JOHN JENSEN
HAROLD M. STEPHENS,
Solicitors for E.J.Groesbeck and American Surety Company, Petitioners.

"The Clerk will please enter appearances as follows:
for Edward E. Jenkins, Receiver, Petitioner,

Emmett M. Bagley.

of Counsel
Robert L. Judd
Paul H. Ray

for E. J. Groesbeck and American Surety Company, Petitioners,

John Jensen.

of Counsel
A. M. Cheney
Harold M. Stephens

RECEIVED three copies of the foregoing Petition for Writ of Certiorari and supporting brief this 1st day of August, 1927.

ARTHUR E. MORETON,
Solicitor for Respondent.

APPENDIX

United States Circuit Court of Appeals

EIGHTH CIRCUIT

United States Fidelity & Guaranty Company, Appellant,
vs.
Centropolis Bank of Kansas City, Missouri, a corporation, et al., Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

Before BOOTH, Circuit Judge, and PHILLIPS and JOHN B. SANBORN, District Judges.

PHILLIPS, District Judge, delivered the opinion of the court.

The United States Fidelity & Guaranty Company (hereinafter called Surety Company) brought this suit against the Centropolis Bank of Kansis City, Missouri, C. E. French, Commissioner of Finance of the State of Missouri, H. F. Lawrence, Deputy Commissioner of Finance of the State of Missouri, Jackson County, Missouri, and E. W. Hayes, Daniel G. Stewart and Henry Rummel, Judges of the County Court of Jackson County, Missouri, to secure a decree, adjudging that the Centropolis Bank, an insolvent banking corporation, is indebted to the Surety Company in the sum of $50,000 and that the Surety Company is entitled to share ratably with other general creditors in the distribution of dividends from the assets of the bank, directing Lawrence, as Deputy Commissioner of Finance, and his successors in office to pay the Surety Company its pro rata share upon its claim of $50,000 of all dividends distributable to general creditors, and enjoining such Deputy Com-

missioner and his successors from paying dividends upon such claim of $50,000 to Jackson County.

The material facts are not in dispute and are as follows:

The Centropolis Bank was a banking corporation organized under the laws of Missouri. On May 9, 1923, the County Court of Jackson County, Missiouri, by order duly entered, awarded a contract to the bank for one-tenth of the county deposits for the ensuing two years. On May 18, 1923, the bank made a written application to the Surety Company for a surety bond to secure such deposit with the bank. The application in part read as follows:

"The undersigned agrees as follows: * * *

2. To indemnify and keep indemnified, from and against all losses by reason of said (United States Fidelity & Guaranty) company having executed said bond * * *." It was duly executed by the bank. Pursuant to such application the Surety Company as surety, and the bank, as principal, executed and delivered to Jackson County a surety bond in the usual form for the penal sum of $50,000. The bond was conditioned as follows:

"The condition of the above obligation is such that whereas, the above bounden Centropolis Bank of Kansas City, was on the 9th day of May, 1923, by the County Court of Jackson County, Missouri, in regular session at Independence, Missouri, duly declared and awarded by said County Court to be the successful bidder as depository for one tenth of the funds of said County for a period of two years, beginning the 19th day of May, 1923, and ending on the 15th day of August, 1925, and to pay interest upon such one-tenth of the funds of said county so deposited with said depository computed on the daily balances with said depository, said Centropolis Bank of Kansas City, at the rate of 3.75 per cent per annum thereof, to the Treasurer of said Jackson County monthly.

Now, therefore, if the said Centropolis Bank of Kansas City shall faithfully perform all of the duties and obligations devolving by law upon said Centropolis Bank of Kansas City as depository of said one-tenth of said funds of said Jackson County, Missouri, as aforesaid, and pay upon presentation of all checks drawn on said depository whenever any funds therefor shall be in said depository when drawn thereon by the proper officers of said county, and that all interest will be promptly paid to the treasurer of said county monthly, and that all of said funds shall be faithfully kept and accounted for according to law, then the above obligation to be void, otherwise to remain in full force and effect."

At about the same time, the bank, as principal, and the Maryland Casulty Company, as surety, executed and delivered to Jackson County a surety bond for the penal sum of $50,000 conditioned the same as the bond of the Surety Company.

On November 14, 1924, the bank, having become insolvent, closed its doors. Whereupon, the Commissioner of Finance of the State of Missouri took charge of the bank and its assets, and since said date has been and now is engaged in liquidating such bank pursuant to the provisions of the laws of Missouri. (Sections 1 and 4 of the Act of March 24, 1921, Laws of Missouri 1921, p. 394, and Secs. 11700 to 11724, inclusive, Revised Statutes of Missouri 1919.) On the day the bank closed, Jackson County had on deposit therein pursuant to such order of the county court, the sum of $122,324.59. It presented checks for the amount thereof to the bank, payment was refused, and it made due demand upon the Surety Company to perform the obligations of its bond. On May 7, 1925, the Surety Company paid to Jackson County $51,441.65, the amount of the penal sum of the bond, together with interest from November 14,

1924, to May 7, 1925, and received from the county a receipt in full for such amount. The Maryland Casualty Company also paid Jackson County the sum of $50,000 with interest from November 14, 1924, to date of payment.

Jackson County filed with the Deputy Commissioner of Finance in charge of the liquidation of the bank, its claim for $122,324.59, the full amount of its deposit. On May 7, 1925, after its payment to Jackson County, the Surety Company filed with the Deputy Commissioner of Finance its claim for $50,000. The Commissioner of Finance approved and allowed the claim of Jackson County, and disapproved and rejected the claim of the Surety Company.

The assets of the bank are insufficient to pay its creditors in full.

After the rejection of its claim, the Surety Company brought this suit. It set up the above facts, and, basing its claim, both on the right of subrogation and on its contract of indemnity, sought the relief above stated.

Jackson County filed an answer and cross bill. By its cross bill it sought a decree directing the Deputy Commissioner of Finance to set aside and pay dividends on its entire claim of $122,324.59 until the amount of such dividends should equal the sum of $22,324.59, the balance remaining after deducting the payments made by the two surety companies.

The trial court held that the Surety Company was not entitled to be subrogated to the claim of Jackson County to the extent of $50,000; that it was not entitled to dividends on its claim for $50,000 pro rata with the general creditors; that it had a claim against the bank but that it was not entitled to receive dividends on such claim until Jackson County had been paid in full; that the Deputy Commissioner of Finance should pay dividends to Jackson County upon its claim of $122,324.59, until such dividends should

equal the sum of $22,324.59, and that he should then pay the remaining dividends, one-half to the Surety Company, and the other half of the Maryland Casualty Company. It entered its decree accordingly, and the Surety Company has appealed from such decree.

Counsel for the Surety Company now abandon any claim under the right of subrogation and predicate their case squarely upon the contract of indemnity.

The first contention urged by counsel for the Surety Company is that the county was only entitled to receive dividends on the sum of $22,324.59, the balance remaining due on the deposit after the application of the payments made to it by the two surety companies.

Where the creditor of an insolvent bank holds collateral security for the payment of its debt, it is entitled to the allowance of a claim for the full amount of its debt, and to the payment of dividends on the entire debt, pro rata with general creditors, until the dividends, plus the amount realized from the security, equals the full amount of the debt. *Merrill* v. *National Bank of Jacksonville*, 173, U. S. 131; *Chemical National Bank* v. *Armstrong* (C. C. A. 6) 59 Fed. 372; *Commercial & Savings Bank* v. *Jenks Lbr. Co.* (C. C.) 194 Fed. 732; *Washington-Alaska Bank* v. *Dexter Horton National Bank of Seattle, Washington*, (C. C. A. 9) 263 Fed. 304; *Goodman Mfg. Co.* v. *Pittsburgh-Buffalo Co.* (C. C. A. 3) 265 Fed. 561; *Pintsch Compressing Co.* v. *Buffalo Gas Co.* (C. C. A. 2) 280 Fed. 830, 844, 845; 32 C. J. p. 882, Sec 176.

Counsel for the Surety Company undertake to distinguish the instant case from the cases above cited. They say that in those cases the debts were either secured by a pledge of collateral or by a mortgage of property, and that here the debt was secured by a contract of suretyship. We are

unable to see any reason why the character of the security held by the debtor should change the rule. We have found only one case on the question where the debt was secured by a contract of suretyship. *Citizens National Bank* v. *Minge*, * * * *Minn.* 52, N. W. 44. In that case, the court said:

2. "Under the late federal bankrupt act, it was provided that, where a debt was secured on the property of the bankrupt, it could only be proved for the balance over and above the value of the security, unless the creditor filed a release of his security. Our insolvent law contains no express provision of this kind, and whether any such is implied is a question not now before us. But, under all bankrupt laws of which we have any knowledge, it has been uniformly held that, where the debt is secured by the property or personal obligation of a third person, who stands in the relation of surety, it is provable for its full amount against the estate of the bankrupt principal debtor, and that too, without the creditor being required to release his security. Any other rule would, for manifest reasons, be unjust alike to the creditor and to the surety."

We therefore conclude that Jackson County is entitled to the allowance of its claim for the full amount of the deposit, to-wit, $122,324.59, and to receive dividends thereon until such dividends shall equal the sum of $22,324.59.

The second contention urged by counsel for the Surety Company is that it is a general creditor of the bank on its contract of indemnity and is entitled to the allowance of a claim in the sum of $50,000 and to share in dividends thereon pro rata with other general creditors.

The contract of indemnity which the bank entered into with the Surety Company was not in contravention of any provision of law or of the public policy of the State of Mis-

souri. It was therefore a legal and enforceable contract. *National Surety Co.* v. *Blumauer* (C. C. A. 9) 247 Fed. 937; *Western Surety Co.* v. *Kelley*, 27 S. D. 465 131 N. W. 808; 31 C. J. 424, Sec. 16.

It is well settled that when a contract of suretyship is made there arises, in the absence of an express agreement, an implied contract that the principal will indemnify the surety for any payment the latter may make to the creditor in compliance with the contract of suretyship. This implied contract arises when the suretyship is made, and not when the payment is made by the surety thereunder. The relation of debtor and creditor exists between the principal and surety from the time the contract of suretyship is made. The payment relates back to the time when the contract was entered into by which the liability to pay was incurred, fixes the amount of damages for which the principal is liable to the surety and matures the cause of action therefor. *Rice* v. *Southgate*, 16 Gray, 82 Mass. 142: *Griffin* v. *Long*, 96 Ark. 268, 131 S. W. 672; In re Stout (D. C.) 109 Fed. 794; *Smith* v. *Young*, Ala. 55 South 425; *Hatfield* v. *Merod*, 82 Ill. 113; *Berry* v. *Ewing*, 91 Mo. 395, 3 S. W. 877; *Martin* v. *Ellerbe's Admr.*, 70 Ala. 326, 335; *Poe* v. *Dixon*, 60 Oh. St. 124, 54 N. E. 86, 88; *Loughridge* v. *Bowland*, 52 Miss. 546; *Bragg* v. *Patterson*, 85 Ala. 233, 4 South 716, 717; *Barth* v. *Graf*. 101 Wisc. 27, 76 N. W. 1100, 1103; *Nally* v. *Long*, 56 Md. 567; *M. Kahn & Bros.* v. *Bledsoe*, Okla., 98 Pac. 291.

In *Rice* v. *Southgate, supra*, the court said:

"Upon well settled principles, it is clear that the contract of a principal with his surety to indemnify him for any payment which the latter may make to the creditor in consequence of the liability assumed takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied

contract or promise of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages for which the principal is liable under his original agreement to indemnify the surety. *Gibbs* v. *Bryant*, 1 Pick. 121. *Appelton* v. *Bascom*, 3 Met. 169."

In *Griffin* v. *Long, supra,* the court said:

"The true rule seems to be that the surety becomes a creditor of the principal at the time he signs the note as surety, and not at the time he pays the same."

In *Smith* v. *Young, supra,* the court said:

"Although a surety cannot maintain an action against his principal on the liability created by the suretyship, until such surety has paid the debt or a part thereof, it is because the right of action does not come into existence until such payment, and not because the relation of debtor and creditor did not theretofore exist. The same thing is true as to the creditor or payee of a note signed by the principal and surety. The payee cannot sue the principal or the surety until the note is due, yet the relation of debtor and creditor certainly exists from the making of the note."

In *M. Kahn & Bros.* v. *Bledsoe, supra,* the court said:

"It has been repeatedly held by the courts that a surety is a creditor of his bankrupt principal, and that he is such creditor before default and from the date of signing the note."

A fortiori such results must follow where an express contract of indemnity is made.

The contract of indemnity created the relation of debtor and creditor between the bank and the Surety Company

from the date the contract of suretyship was executed and delivered to Jackson County. The payment made by the Surety Company related back to the date of the contract of indemnity, fixed the amount of damages for which the bank was liable to the Surety Company and matured the latter's cause of action on the contract of indemnity.

It follows that the Surety Company became a creditor of the bank on May 19, 1923, when the county depository bond was executed and delivered; that the Surety Company was a creditor of the bank when the bank became insolvent, closed its doors and went into the hands of the Deputy Commissioner of Finance for the purpose of liquidation on November 14, 1924; that upon the payment by the Surety Company of the penalty of the bond on May 7, 1925, a cause of action accrued in its favor against the bank which had its inception in the contract of indemnity and which related back to the date of the contract of suretyship made May 19, 1923.

What remedy has the Surety Company on this cause of action? The act under which the assets of the bank are being collected, distributed and paid out to creditors contemplates that all of the bank's assets shall be collected, converted into money and distributed to the creditors, and that the banking corporation shall be dissolved, unless the creditors are paid in full. Secs. 11713, 11715, 11716, 11717, 11718, 11719, 11720, 11721, 11722, and 11702, Rev. St. Mo. 1919. The mere fact that the claim accrued after the bank was closed and placed in the process of liquidation should not prevent, under such circumstances, the Surety Company from having its claim allowed.

In the case of *Spader* v. *Mural Decoration Mfg. Co.*, N. J. Eq., 20 Atl. 378, certain persons had entered into contracts with the corporation for personal services for a term of years. Before these contracts expired, and while they

were in full force and effect, the corporation became insolvent and was placed in the hands of a receiver. Thereafter, the contracts were breached and persons employed by the corporation under such contracts filed their claims with the receiver. In passing on these claims, the court said:

"The general scheme of the act contemplates the ascertainment and payment of all just liabilities. The terms 'creditor' and 'debt' are not used in a narrow, restrictive, or technical sense. It could hardly have been the intention of the law-makers to distribute the surplus of assets, or, in other words, return capital, to the stockholders of the company,—that is, to those who deliberately ventured for gain, and pledged their capital for the security of those who were induced to deal with them,—and at the same time disregard those who, dealing with those stockholders upon the faith of that security, became justly entitled to damages for breaches of contracts occasioned by an insolvency and suspension that the very capital relied upon was intended to ward off. Such distribution would be the protection of capital against its just liability. The receiver is bound in duty, and clothed with power, to reach out and take in every conceivable asset due, or thereafter to accrue, to the corporation. A complete collection of assets is contemplated, and a full and final distribution of them is made possible. Such being the situation, natural justice demands that those who suffer from breaches of contract should be included in the distribution, even though the breaches and the consequent damages follow the insolvency, and I think that it is in consonance with the scope and design of the legislation considered to give the statute a broad and liberal interpretation which will admit of that justice being done. * * * I can see no reason, under this law, for distinguishing between cases where the breach of contract precedes the ad-

judication of insolvency and cases where the breach follows in consequence of that adjudication."
See also *Minneapolis Baseball Co.* v. *City Bank,* 74 Minn. 98, 76 N. W. 1024; *McGraw* v. *Union Trust Co.,* 135 Mich. 609, 98 N. W. 390.

We think the Surety Company is a creditor and that it has a claim within the meaning of the statutes of Missouri referred to above.

We therefore conclude that the Surety Company is entitled to have its claim allowed for the sum of $50,000 and to share in the distribution of the assets of the bank.

There is nothing in the act which creates any priority as between the claims of general creditors. Jackson County, the other depositors of the bank, and the Surety Company are general creditors. They are entitled to share ratably unless there is something in the contract of suretyship which gives Jackson County a priority over the Surety Company.

Counsel for the county and for the Deputy Commissioner of Finance seek to find this right of priority in the provisions of the condition of the bond. They say the condition was that the bank should faithfully perform all of the duties and obligations devolving upon it as a depository of the funds of Jackson County, and should pay upon presentation all checks drawn on such depository and that all funds of the County deposited with the bank should be faithfully kept and accounted for according to law. They contend that by these provisions of the bond, the bank, as principal, and the Surety Company as surety, guaranteed the payment of the full deposit, and that to permit the Surety Company to share pro rata with the general creditors in the payment of dividends will lessen the amount of dividends payable to the county, and thereby violate the spirit of the guaranty. They cite in support of their position: *Maryland*

Casualty Co. v. *Foutz,* (C. C. A. 4) 11 F. (2d) 71, and *Zimmerman* v. *Chelsea Savings Bank,* 161 Mich. 691. 125 N. W. 424. In support of their contentions, counsel for the Surety Company cite *United States F. & G. Co.* v. *Carnegie Trust Co.,* 164 N. Y. S. 92, 221 N. Y. 646; 117 N. E. 1086; *American Surety Company of New York* v. *National Bank of Barnesville* (D. C. Southern District of Ohio, not officially reported); *In the Matter of Dailey and Ivins, Bankrupts* (D. C. New Jersey, not officially reported).

If the question here were one of subrogation, we could readily agree with the contentions of counsel for the Commissioner of Finance and the County. It is a familiar principle of the law of subrogation that a surety liable only for part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied. *United States* v. *National Surety Co.,* 254 U. S. 73; *United States F. & G. C.* v. *Union Bank & Trust Co.,* (C. C. A. 6) 228 Fed. 448, 455; *National Surety Co.* v. *Salt Lake County* (C. C. A. 8) 5 Fed. (2d) 34, 36. The reasons for the rule are well stated in *Guaranty Co.* v. *Trust Co., supra,* where the court said:

"The right of a surety on a bond to be subrogated for the obligee in a right of action against one wrongfully causing the liability is founded on payment by the surety to the obligee, and it does not come into existence except upon full payment of the loss indemnified against. This is because subrogation is of an equitable character, and the surety cannot be permitted to take away from the obligee, to the latter's prejudice, securities or rights in which he is still beneficially interested.

But here, the Surety Company does not claim through subrogation, any right of Jackson County, but asserts an independent claim in its own right upon a contract which it entered into with the bank.

Contracts of suretyship should be interpreted like other classes of contracts, according to the sense and meaning of the terms which the parties have used, and those terms should be taken, understood and given effect in their plain, ordinary and popular sense, fairly and justly to all the parties to the contracts. *New Amsterdam Casualty Co.* v. *Central Natl. Fire Ins. Co.* 4 F. (2d) 203, 208; *Atlas Reduction Co.* v. *New England Ins. Co. of New Zealand* (C. C. A. 8) 138 Fed. 497; *Hawkeye Commercial Men's Ass'n* v. *Christy,* 294 Fed. 208; *Imperial Fire Ins. Co.* v. *Coos County,* 151, U. S. 452, 462, 463.

We think that a construction of the bond in the instant case in accordance with above rule compels the conclusion that it was the intention of all of the parties to the contract that the Surety Company should be liable to the county for *all* of the principal of the county's deposit, together with interest thereon, up to and including, but not exceeding, the sum of $50,000, and that the recital in the bond that the penal sum thereof is $50,000, just as effectually limits the language of the condition as if there had been written into the language of the condition itself the words "up to and including but not exceeding $50,000." It is true that the liability under the bond was not limited to any particular portion of the whole deposit. In that sense, the bond was security for the whole deposit, and for that reason the right of subrogation does not exist, but the maximum amount for which the Surety Company could be held liable thereunder was expressly fixed at $50,000. The Surety Company has discharged that liability by payment in full. The county has received all that it contracted for from the Surety Company. How then can the county say that the spirit of the guaranty will be violated? We find nothing in the language of the bond which justifies the contention that the claim of the county upon its contract of deposit should be

given any priority over the claim of the Surety Company upon its contract. This conclusion has not been reached without a careful consideration of the opinion of the Fourth Circuit in *Casualty Co.* v. *Foutz, supra,* and the Supreme Court of Michigan in *Zimmerman* v. *Bank, supra.*

The Surety Company contracted to reimburse the county for the defaults of the bank up to and including the penal sum of $50,000. It has fully performed that contract. It in turn took a contract from the bank to indemnify it for such loss on its part under the bond. Such contract of indemnity was valid. It created the relation of debtor and creditor when the bond was executed and delivered. It has been breached. The Surety Company asserts a claim for damages on account of such breach as a general creditor of the bank. Such being the facts and the relation of the parties we can see no logical answer to the contention that the Surety Company is entitled to the allowance of its claim as a general creditor on its contract of indemnity and to share in dividends thereon pro rata with other general creditors.

The decree of the court below is therefore reversed and the cause is remanded with instructions to modify the decree in accordance with this opinion. The costs of the appeal will be assessed equally against Jackson County and the Commissioner of Finance as liquidating officer of the bank. It is so ordered.

Filed February 9, 1927.

FILED

DEC 28 1937

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1937

EDWARD E. JENKINS, Receiver of The National City Bank of Salt Lake City, Utah, et al.,

Petitioners,

vs.

THE NATIONAL SURETY COMPANY,

Respondent.

No. 424

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1927

EDWARD E. JENKINS, Receiver of The National City Bank of Salt Lake City, Utah, et al.,
Petitioners,
vs.
THE NATIONAL SURETY COMPANY,
Respondent.
No. 424

BRIEF OF PETITIONERS' ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS OF COURTS BELOW

The decree of the District Court for the District of Utah in this case dated December 31, 1925, appears at page 51 of the record, and the opinion of the Circuit Court of Appeals of the Eighth Circuit dated March 28, 1927 (rehearing denied June 14, 1927), reversing the decree of the District Court appears at page 232 thereof. (18 Fed. [2d.] 707). The Circuit Court's holding on the suretyship aspect of this case is controlled by and rested upon its decision in the case of United States Fidelity & Guaranty Company v. Centropolis Bank of Kansas City, Mo., et al., opinion filed February 9, 1927, (17 Fed. [2d] 913). For the convenience of the court we have printed that opinion in full as an appendix to our brief in support of petition for writ of certiorari.

The decree of the District Court in the first case between these same parties involving this same matter appears at

page 107 of the record, and the opinion of the Circuit Court of Appeals of the Eighth Circuit affirming that decree appears at page 110 thereof (5 Fed. [2d] 34).

JURISDICTION

The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (c. 229, 43 Stat. 936, 938). Writ of Certiorari was granted by this Court on October 31, 1927.

STATEMENT OF FACTS

Edward E. Jenkins is receiver of the National City Bank of Salt Lake City, Utah. Up until January 17, 1922, the day of its failure, the Bank was engaged in a general banking business in Salt Lake City, Utah. E. J. Groesbeck was treasurer of Salt Lake County. Upon his election and qualification as such he, as principal, and the American Surety Company, as surety, gave to Salt Lake County a fidelity bond in the sum of $200,000.00, conditioned upon his safely keeping all funds of Salt Lake County coming into his hands as treasurer. Thereafter Groesbeck deposited funds coming into his hands as treasurer with the National City Bank. To protect his deposit Groesbeck received from the Bank three depository bonds: one for $125,000.00 with the National Surety Company as surety; one for $75,000.00 with the Fidelity and Deposit Company of Maryland as surety, which provided for immediate pro tanto subrogation; one for $25,000.00 with the Massachusetts Bonding & Insurance Company as surety. In addition the Bank delivered to Groesbeck as collateral $360,000.00 par value of the bonds of the Crystal Lake Farms Company.

The National, in its motion filed with the Circuit Court of Appeals to modify its decree, asserted that since the case was tried and argued to the Circuit Court of Appeals the Crystal Lake Farm bonds were sold for a sum somewhat less than $90,000.00.

Despite the sale of those bonds Groesbeck and his assignee, the American, are still unpaid and have no prospect of being paid in full by many thousands of dollars if the decision of the Circuit Court of Appeals stands. The petitioners filed with the Circuit Court of Appeals separate answers to the charge of the National that the sale of the Crystal Farm bonds might affect this case. Those answers appear at pages 257 and 258 of the record and conclusively show that even after the sale of those bonds Groesbeck and the American have not been paid in full and cannot be if the decision of the Circuit Court of Appeals stands. We respectfully refer the court to those replies.

When Groesbeck as treasurer applied to the American Surety Company for his $200,000.00 official bond he agreed to indemnify and save said company free from loss on account of said bond. When the Bank procured the depository bonds from the National Surety Company, Fidelity and Deposit Company of Maryland and the Massachusetts Bonding & Insurance Company it agreed to indemnify and save those companies harmless and free from loss on the depository bonds.

The National Surety Company's depository bond provided that if the bank "shall well and truly keep all sums of money so deposited or to be deposited" and "shall pay over the same" upon Groesbeck's demand, and "shall in all respects save and keep the said Edward J. Groesbeck, treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue." (R. 62-63-64). It will be observed that the National's bond is a guarantee for the whole of Groesbeck's deposit without limitation or condition save as to penalty.

For brevity and convenience Edward E. Jenkins, as receiver, will hereinafter be referred to as receiver; E. J. Groesbeck, treasurer, will be referred to hereinafter as Groesbeck; the National Surety Company as the National, and the American Surety Company as the American, the National City Bank, as Bank.

Upon the day the Bank failed Groesbeck had on deposit $643,094.29. This sum was deposited by him as treasurer of

Salt Lake County, and Salt Lake County has been repaid in full as follows:

By the American Surety Company as surety on Groesbeck's official bond	$200,000.00
By the National Surety Company as depository surety	125,000.00
By the Fidelity and Deposit Company as depository surety	75,000.00
By the Massachusetts Bonding & Insurance Company as depository surety	25,000.00
By dividends from the receiver on account of the treasurer's deposit	218,094.29
Total	$643,094.29

It will be seen that Salt Lake County was made whole not alone by the payment of the depository bonds and dividends but by those payments plus $200,000.00 paid by the American as surety for Groesbeck. The American having paid this sum, together with $23,362.15 interest, and Groesbeck, being indebted to the American in that amount, he thereupon assigned to the American his rights against the Bank and its receiver.

When it became apparent that the County was about to be made whole on account of moneys which Groesbeck had deposited in the Bank, Groesbeck and the American made claim upon the receiver that they were entitled to all future dividends accruing on account of Groesbeck's deposit until such time as they were made whole. At the same time the National Surety Company and the Massachusetts Bonding and Insurance Company, as depository sureties, made claim to the receiver that they, having paid the full penalties of their depository bonds, were entitled to pro tanto subrogation against the receiver to the amount of their payments and were thereafter entitled to receive their pro tanto share of dividends on Groesbeck's deposit even before Groesbeck and the American were reimbursed. *The depository sureties also advanced their claims upon their indemnity agreements and demanded approval of their claims and payment of dividends thereon.*

All parties agreed that by the terms of its bond the Fidelity and Deposit Company was, upon payment of the penalty of its bond, entitled to immediate subrogation in that amount. This resulted in a reduction of Groesbeck's claim from $643,094.29 to $568,094.29. The receiver refused to resolve these conflicting claims without a decree of the court.

Thereupon Groesbeck and the American Surety Company brought suit against the receiver in the United States District Court for the District of Utah. In their complaint the payment by the American, as surety on Groesbeck's official bond, was set up and the claim made by Groesbeck and the American that the American and Groesbeck were entitled to receive all dividends thereafter accruing on account of Groesbeck's claim against said bank until such time as he and the American were made whole.

The receiver answered said suit and filed his bill of interpleader praying that the National and the Massachusetts Bonding & Insurance Company, depository sureties, be required to come into court and set up their claims, if any they had. As a result the National and the Massachusetts Bonding & Insurance Company came into court as interpleaded defendants. They denied the right of Groesbeck and the American to priority in the enjoyment of dividends paid and to be paid on account of Groesbeck's claim. The National moreover asserted that the Bank in its application for depository bond had agreed to indemnify and save it harmless from any loss on account of the issuance of said bond and asserted that it was entitled to have its claim theretofore filed with the receiver in the amount of its depository bond approved and allowed and receive dividends thereon, and specifically prayed for such relief (R. 91, 92, 93).

The American answered the complaint of the National in intervention and denied that the National was entitled to have its claim based upon its alleged indemnity agreement allowed and denied that the National was entitled to receive any dividends from the receiver until after the American and Groesbeck were paid in full. (R. 95, 96).

Upon the issues thus joined the trial was had and the issues were decided in favor of Groesbeck and the American and against the National and the Massachusetts Bonding & Insurance Company. (Attention is invited to decree in first suit. R. 107).

An appeal was taken from that decree to the United States Circuit Court of Appeals for the Eighth Circuit. The Circuit Court of Appeals affirmed the judgment of the trial court. (R. 110).

After the affirmance of the District Court's decree in the former case this action was filed in the United States District Court for the District of Utah by the National, wherein it alleges that by reason of the indemnity agreement given to it by the Bank at the time its depository bond was issued, it is entitled to have its claim for $120,000.00 ($5,000.00 having been assigned to the American Indemnity Company) approved and allowed by the receiver and to receive dividends thereon notwithstanding Groesbeck and the American, his surety and assignee, have not been paid in full.

Again the receiver filed his answer and bill of interpleader and prayed that Groesbeck and the American be brought in to show such reasons as they might have why the claim of the National should not be approved and allowed and dividends paid thereon. The American and Groesbeck came into this action as interpleaded defendants. Issue was joined between all parties and a trial had. The District Court held that the subject matter of this action was fully determined and adjudicated by its prior decree and that while the National's claim should be approved and allowed this should be specifically subject to the limitation and qualification that the National should receive nothing from the receiver by way of dividends until Groesbeck and the American his assignee, had been fully repaid the sum of $223,362.15, together with interest on the sum of $200,000.00 from February 29, 1924, as provided in the prior decree, and that the qualified allowance of the National Surety Company's claim should not affect the present basis of computing and paying dividends as established by the receiver upon claims theretofore approved. (R. 51).

This case then went to the Circuit Court of Appeals of the Eighth Circuit and on March 28, 1927, that court in an opinion delivered by District Judge Phillips, concurred in by Circuit Judge Booth and District Judge J. B. Sanborn, reversed the decree of the District Court and directed the District Court to enter a decree requiring the receiver to allow the claim of the National Surety Company on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors, including dividends heretofore paid to general creditors.

The Circuit Court of Appeals held that the subject matter of this controversy was not res judicata and that even though Groesbeck and the American, his assignee and subro-

gee, have not been paid in full, the National, which guaranteed his whole deposit and agreed by its bond to save Groesbeck harmless and free from loss, shall be permitted to deplete the only fund out of which Groesbeck and the American can be made whole.

The suretyship aspect of this case is not discussed by the Circuit Court of Appeals in its decision. The Circuit Court rests its ruling upon that feature of the case upon its decision in the United States Fidelity & Guaranty Co. v. Centropolis Bank of Kansas City, Mo., et al., (C. C. A. 8, opinion filed February 9, 1927) 17 Fed. (2d) 913.

The amount of approved claims against the Bank at the time of the trial of this case was $1,583,926.88. (R. 70). It follows that Groesbeck's claim in the sum of $568,094.29 (R. 67), amounts to more than one-third of all the approved claims. If, therefore, the decision of the Circuit Court of Appeals stands, the result will be that of every dollar paid the National out of the funds of the bank one-third will be received at the loss and expense of Groesbeck.

At the time of the trial the receiver had paid sixty per cent in dividends upon approved claims and at that time estimated that he might be able to pay fifteen per cent additional. (R. 70). Under the decision of the Circuit Court of Appeals the National and its assignee would receive at once sixty per cent, or $75,000.00, more than $25,000.00 of which would otherwise go to Groesbeck and his assignee. It will result under the decision of the Circuit Court of Appeals that the National which guaranteed the whole of Groesbeck's deposit and agreed that it, the National, would in any event lose $125,000.00 before Groesbeck should lose anything, will by depletion of the Bank's assets reduce its loss from $125,000.00 to approximately $40,000.00, depending upon what further dividends may be paid by the receiver, and will at the same time leave Groesbeck, the depositor whom it agreed to protect, unpaid on account of his deposit.

The errors which petitioners urge as ground for reversal of the decree of the Circuit Court of Appeals are:

SPECIFICATION OF ERROR.

1. The court erred in holding that a depository surety of a failed bank is entitled to have its claim, based upon its indemnity agreement with such bank, allowed and dividends paid thereon before the obligee of such surety who deposited funds with the failed bank has been paid in full, where such surety guarantees the whole of such deposit without qualification or limitation save as to the penalty of its bond.

2. The court erred in holding that such surety company, after payment of the penalty of its bond, becomes, by virtue of its indemnity agreement with the failed bank, a creditor of the receiver in such a sense as to be entitled to receive pro rata dividends with those who were depositors and creditors of the Bank prior to its failure.

3. The court erred in failing to hold that the decision in the first case between these parties adjudicated and disposed of the right of the National Surety Company to recover anything by way of dividends on its indemnity claim until Groesbeck was paid in full.

4. The court erred in failing to affirm and in reversing the decision herein of the District Court of the United States for the District of Utah.

5. The court erred in holding and determining that this cause be remanded with instructions to enter a decree directing the receiver to allow the claim of the National for the sum of $120,000.00 on its contract of indemnity as a general creditor and to pay dividends thereon pro rata with the other general creditors including dividends heretofore paid to general creditors.

6. The court erred in holding and determining that the National is entitled to receive anything by virtue of its contract of indemnity with the Bank until Groesbeck and the American, his assignee and subrogee, have been made whole and until Groesbeck's entire deposit with the Bank has been paid.

7. The court erred in following and applying to this case its decision in the case of United States Fidelity & Guar-

anty Company v. Centropolis Bank of Kansas City, and particularly in applying to this case the doctrine of relation back therein announced and thereby holding that the relation of debtor and creditor existed between the National and the failed bank as of the date of the execution of the bond, since "the doctrine of relation 'is a legal fiction invented to promote the ends of justice . . . it is never allowed to defeat the collateral rights of third persons lawfully acquired.' ".

8. The court erred in failing to hold that as a matter of contract the bond of the National stood behind Groesbeck's entire deposit and that until that deposit has been paid in full and Groesbeck has been made whole the National can recover nothing on its indemnity agreement.

9. The court erred in failing to hold that it is the final amount left unpaid by the Bank which was intended to be secured and which was secured by the National's bond, and that the National agreed to lose $125,000.00 clear before Groesbeck should lose anything, and that therefore the National ought not and cannot by virtue of its indemnity agreement, reimburse itself by receiving dividends from the Bank in competition with Groesbeck, thereby depleting the only fund from which Groesbeck can be made whole, and thereby recouping itself so that it does not lose $125,000.00 clear but substantially reduces that amount by receiving moneys which would otherwise go in part as dividends to Groesbeck and his assignee.

10. The court erred in holding that the National is not barred from maintaining this action under and by reason of the doctrine of res judicata.

ARGUMENT.

I.

THE NATIONAL UNDER ITS CONTRACT, IS NOT ENTITLED TO PARTICIPATE IN THE ASSETS OF THE BANK IN COMPETITION WITH GROESBECK AND OTHER GENERAL CREDITORS UNTIL GROESBECK HAS BEEN PAID IN FULL.

The conditions of the depository bond furnished by the National to Groesbeck are as follows:

> "Now, Therefore, if the said The National City Bank of Salt Lake City, shall, at the beginning of each

> and every month render to the said Edward J. Groesbeck, treasurer, a statement, in duplicate, showing the daily balance of the County of Salt Salt Lake's moneys held by it during the month next preceding and the interest thereon, and how the same has been credited, and shall well and truly keep all said sums of money so deposited or to be deposited, as aforesaid, and the interest thereon, subject at all times to the check and order of the said Edward J. Groesbeck, treasurer as aforesaid, and shall pay over the same, and any part thereof upon the check or written demand of the said Edward J. Groesbeck, treasurer, and to his successor in office as shall be by him demanded, and shall calculate, credit and pay said interest as aforesaid, and shall in all respects save and keep the said Edward J. Groesbeck, treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits, then this obligation shall be void and of no effect, otherwise to be and remain in full force and virtue." (R. 63, 64).

It will be noted that the bond runs to the treasurer and is conditioned upon the Bank "well and truly keeping all sums of money deposited at all times subject to the check of the treasurer", and is not a guarantee of a deposit of only $125,000.00 as asserted by the National on page 3 of its brief filed in opposition to the granting of the writ of certiorari. It will be further noted that the bond indemnifies Groesbeck against loss and guarantees any and all deposits made, without qualification or limitation save only as to the penalty of the bond. When it accepted Groesbeck's deposit, certainly the Bank agreed with the treasurer to pay back the entire deposit, and the National, by its agreement with Groesbeck—its depository bond—guaranteed the performance of the Bank's agreement.

In the face of the plain terms of the surety's contract with Groesbeck the Circuit Court has held that although Groesbeck has not yet been paid in full the National is entitled to have its claim allowed and to receive dividends in competition with Groesbeck at his loss and expense and is entitled to the immediate payment by the receiver of back dividends amounting to 60 per cent.

To allow the National to recover anything on its indemnity agreement until Groesbeck has been made whole is to violate the plain terms of the National's guaranty to him and to reduce its liability as guarantor of his entire deposit, a liability which continued "as well after as before" the payment of the penalty of its bond. And yet the Circuit Court of Appeals would allow the National to have its claim allowed and would allow it to receive dividends out of the assets of the Bank in competition with Groesbeck and at his expense; and would direct the immediate payment to the National of 60 per cent of its claim out of the remaining assets of the Bank.

Unquestionably the National might have become surety for the Bank upon the condition that the debt it guaranteed should not exceed the penal sum of its bond or that only so much credit should be extended to the bank as should not exceed the penalty of its bond. But that is not the character of the National's bond. It involves no assumption to say that the National's bond is without limitation save as to its penalty. It guaranteed Groesbeck's entire deposit. That is precisely what the Eighth Circuit Court of Appeals held in the first case between these parties.

Upon what theory then in the face of such an outstanding and as yet unperformed contract can the National, with Groesbeck still unpaid, be allowed to compete with Groesbeck in receiving dividends from the Bank? Certainly the National cannot, by virtue of an independent agreement with the bank to which Groesbeck was a stranger, assert rights to any moneys by way of dividends paid by the receiver until Groesbeck has been paid in full and until the obligation of the National's bond which stands behind his entire debt or deposit has been fully performed. And yet this was the very ground asserted and relied upon by both court and counsel for allowing the National to escape from the plain terms of its contract with Groesbeck.

The National seeks to write into its depository and indemnity bond to Groesbeck the provisions of a collateral indemnity which it took from the bank and to which Groesbeck is an entire stranger. That it cannot do. The fundamental difficulty which confronts the National in seeking to have its indemnity claim allowed and dividends paid thereon is that it comes before the court with an outstanding contract of indemnity and guaranty to Groesbeck as yet unperformed and without prospect of full performance.

The National's bond stands not behind any particular part of Groesbeck's deposit, but behind all of it so as to be a guaranty against ultimate loss—a guaranty of the last $125,000.00, or any part of it. Can it be that under its bond the National may recover back out of the assets of the Bank—and out of the very money that Groesbeck placed in the Bank—in excess of $75,000.00 while Groesbeck, according to the record, is still out of pocket on account of his deposit many thousands of dollars? Such is the result if the decision of the Circuit Court of Appeals is allowed to stand. Groesbeck had—and still has—the right to look both to the assets of the Bank and the security of the National's bond for the recovery of his entire deposit. The authorities clearly established that it was his right to receive dividends upon his deposit from the receiver as long as dividends were available, *and then* to call upon the National for the residue of his debt or deposit up to the full penalty of its bond.

The fact that in this case the National paid Groesbeck the penalty of its bond before the receiver ceased to pay dividends does not entitle the National to compete with Groesbeck in receiving dividends from the Bank. Groesbeck did not need protection against loss of that part of his deposit which the bank could repay by way of dividends in the event of failure.

By its bond the National agreed to stand between Groesbeck and ultimate loss on his deposit. As long as any part of his deposit remains unpaid Groesbeck holds the National's agreement to protect him to the extent of $125,000.00. If the National is now allowed to recoup itself from the funds of the Bank the inequity of such result will be apparent from the fact that the money which it receives will be taken out of the fund to which Groesbeck was entitled to look and the integrity of which the National guaranteed. As long as Groesbeck is unpaid to the extent of $1.00 the National, by the terms of its bond, is required to stand back and withhold interference with any of the securities to which Groesbeck might resort. Otherwise the National does not lose the $125,000.00 as it has agreed, and just to the extent to which it minimizes its loss at the expense of Groesbeck it is relieved from the obligation of its contract.

There are many cases to support this contention, and except for the decision of which we now complain we know of no respectable authority to the contrary.

In Maryland Casualty Company v. Fouts, 11 Fed. (2d) 71, the Fourth Circuit Court of Appeals had before it the same questions now presented to this court for review. In that case the Maryland Casualty Company executed, as surety for the Peoples National Bank of Salisbury, a depository bond to the State Treasurer of North Carolina, in the sum of $50,000.00, the bank giving to the Surety an indemnity agreement like the one now relied upon by the National. At the time of the failure of the Salisbury bank it was indebted to the State Treasurer in the sum of $89,579.14. The terms of the National's bond given to Groesbeck are stronger and more comprehensive than those of the Maryland Casualty Company's bond, the essential terms of which are set out in the opinion. Both bonds are general and comprehensive and are without any limitation save as to penalty and in each instance guarantee the whole of the public official's deposit. The two cases cannot be distinguished. After paying the penalty of its bond the Maryland Company brought suit claiming that by reason of such payment it was subrogated to the claim of the State Treasurer of North Carolina to that amount and also "that it was entitled to dividends as any other creditor of the bank, upon the $50,000.00" so paid by it for the bank. There, as here, the treasurer had not been paid in full; there, as here, while the surety company had paid the penalty of its bond the whole debt due the treasurer had not been discharged.

In its brief filed in this court in opposition to our petition for writ of certiorari the National, in discussing the opinion of the Fourth Circuit Court of Appeals, says in italics at page 21:

> "No reference was made, either in the original opinion or in the opinion on rehearing, as to the right's if any, acquired by the surety by reason of its Indemnity Agreement."

This statement seems to us unwarranted and reckless. Early in its opinion (pages 71 and 72) the Fourth Circuit Court of Appeals says:

> "The said amount was paid by appellant without waiving any of its rights under the bond, and expressly reserving its right to hold the People's National Bank of Salisbury under an agreement between the bank and it for the reimbursement of any loss sustained by the surety company under the bond.

> It appeared that, at the time the Maryland Casualty Company executed the bond of $50,000 to B. R. Lacy, state treasurer, the People's National Bank of Salisbury entered into an agreement with the casualty company in connection with the application for, and execution of, said depository bond, the second provision of which agreement is as follows:"

Then follows a quotation of the indemnity agreement relied upon by the Surety in that case, after which the court sets forth the grounds presented by the surety to the trial court for relief. Among those grounds are:

> "(1) That when it paid to the state treasurer of North Carolina $50,000 it was entitled to prove its claim for that sum.
>
> "(3) That it was entitled to dividends as any other creditor of the bank upon the $50,000."

Thereafter the Circuit Court of Appeals sets forth a portion of the trial court's opinion which it affirmed:

> " ' . . . That the plaintiff is not entitled to recover of the defendant, J. E. Fouts, receiver of the People's National Bank of Salisbury, on its indemnity agreement with the said bank, and that the said Maryland Casualty Company is only entitled to subrogation to the rights of B. R. Lacy, treasurer of the state of North Carolina, as hereinbefore set forth.' "

The Circuit Court of Appeals of the Fourth Circuit affirmed the decision of the District Court upon the theory, primarily, that to permit the Maryland Company to recover would be to allow that company to violate the very terms of its own contract.

While the surety in that case relied in part upon the right to subrogation, it nevertheless pleaded and relied equally upon its indemnity agreement, and the question of its right to recover dividends based thereon was squarely raised by the surety and squarely decided by the court.

The court held that while the surety's bond was in the sum of only $50,000.00, it nevertheless stood behind the entire

deposit. The court developing the point a step further held that until the entire deposit was paid, the agreement of the surety company remained unfulfilled and outstanding and there was *no ground* upon which it could participate in the assets of the bank. The point is so persuasively developed and clearly stated by the court that we submit from its decision the following:

> "To allow the appellant to assert such indebtedness, based upon its alleged claim as a creditor for the amount paid by it under its bond of indemnity to the State, and claimed to be in full of such liability, would be to permit the assertion of a claim in behalf of a guarantor against those it undertook to indemnify, in advance of the latter being paid in full the amount due them . . .
>
> "As long as the undertaking on account of which the security was given remains unpaid, in whole or in part, the one giving the indemnity cannot invoke the aid of a court of equity to save it from the consequence of having to make payments on account of the obligation it gave, by decreeing to it dividends from the estate of the insolvent bank, and leaving the debts of such institution indemnified against unpaid. To allow this to be done would operate most unfairly against the state, whose debt was secured. . . .
>
> "The fact of the indebtedness, on account of which the surety was given, not having been paid in full, alone required the denial of the relief prayed for, as the right of subrogation cannot be availed of to collect an indebtedness by one himself liable for the debt, and which obligation he has not met. The decisions of the courts of last resort, federal and state, and the text writers of the highest standing, have given full and frequent consideration to this subject, and with one accord they sustain the views herein given. . . .
>
> "Appellant's position is purely *contractual*, and until it has met its liability and the state has been paid in *full*, as well for the excess deposits of $39,579.14, as for the *penal amount* of the indemnity bond, it has no right, by subrogation *or otherwise*, in a case

> like the present one, to call upon others to share its burdens."

In the foregoing the court pertinently points out that the surety, while the debt it guaranteed remains unpaid, cannot be decreed dividends from the estate of an insolvent bank, since to just the extent a court of equity allows it to receive such dividends the court saves it, the surety, "from the consequence of having to make payments on account of the obligation it gave". In other words, the surety is not really suffering the penalty it contracted to pay if, while the obligation it indemnified remains unpaid, it can pay that penalty with one hand and receive back dividends to diminish that penalty with the other hand.

The Supreme Court of Michigan in Zimmerman v. Chelsea Savings Bank, 125 N. W. 424, had before it a case involving all of the points which have been relied upon by the National, both in this and in the former case. In that case the American Surety Company as surety relied upon its contract of indemnity, as does the National in this case. It filed its claim in the sum of $50,143.40—the penalty of its bond which it paid—with the receiver, and asked the court to direct the allowance thereof and to order the payment of dividends thereon. There, as here, the surety had written a depository bond for the bank. The state treasurer, relying thereon, deposited state funds. The bank's application for the bond contained an indemnity agreement similar to that running from the Bank to the National in this case. When the Bank failed it had on deposit funds of the state amounting to $685,587.70, to secure which the state held six depository surety bonds, aggregating the sum of $200,000.00, included among which was the American Surety Company's bond of $50,000.00. The surety company upon the demand of the state paid the face of its bond with interest, and in its complaint in intervention urged as its fourth ground of recovery "*that the agreement of indemnity given by the bank to the surety company took effect as of its date immediately upon payment of the bond and that such agreement entitled the surety to stand as a creditor of the bank and receive its share of any dividends paid.*"

Notwithstanding this contention relied upon by the surety in the Michigan case the National in its brief heretofore filed in this court says, at page 20:

> "In the Zimmerman case the question of a right based upon the Indemnity Agreement was in no way de-

cided, and not even remotely referred to in the decree or opinion of the trial Court, nor in the opinion of the Supreme Court."

In disposing of this and other claims made, the court pertinently observed:

"The condition of the bond is that if the said bank shall, in accordance with said contract, safely keep and reimburse and pay over upon demand all moneys belonging to the said state of Michigan deposited with it by said State Treasurer in accordance with said contract, etc., 'then this obligation to be void, otherwise to remain in full force and effect.'

"The language employed is not ambiguous; the ordinary meaning thereof is not doubtful. In terms the liability of the surety is *that of the principal* limited only by the penalty of the bond and by provision for paying no more than such proportion of the total loss sustained by the Treasurer of the state as the penalty of this bond bears to the total of the penalties of all bonds furnished by said bank as principal in favor of said State Treasurer. . . .

"The debt due to the state from the bank is the sum of all deposits. The bank, the principal in the bond, has not paid the debt and upon its failure so to do the surety became at once liable to pay the amount which it had agreed to pay. The surety has paid. It paid the entire penalty of the bond because the debt due to the state from the bank exceeded in amount the aggregate of the penalties of all bonds.

" . . . We reject the theory that a particular bond furnished by a depository of state funds, conditioned like the bond in question here, should be treated as securing a particular deposit of funds. And this as well when the state has the 'good and ample security' which the intervener says it should have taken as when it has not. The deposits in the Chelsea Savings Bank were made, generally, from time to time, and were from time to time

withdrawn. That this would be the course of affairs was to be expected, and that it was so understood is evident. All security was given and accepted for all the deposit, whatever the amount of the deposit might be. If intervener secured and intended to secure any particular deposit of $50,000.00 it had no occasion to provide that it should pay no greater part of any loss than the proportion of the penalty of its bond to the total penalties of all bonds. *Its undertaking is that its principal shall repay all moneys deposited and it must be construed as a security for the whole debt.* It is conceded, and the authorities cited by counsel for the intervener sustain the concession and the general rule, that in such a case the guarantor is not entitled to a share of the dividends which are declared and paid in reduction of the whole debt. 1 Brandt, Suretyship and Guaranty (3d Ed.) sec. 277; Ellis v. Emmanuel, Law Rep. 1 Echeq. Div. 157; Dumont v. Fry (C. C.) 14 Fed. 293."

The right of the depository surety to enjoy dividends before his obligee is paid in full is discussed and the result for which we contend is reached by the Louisiana court in Board of Health v. Teutonia Bank & Trust Company, 68 So. 748:

"Thus it is seen that the condition of the bond was to secure the return of 'any and all sums deposited' with the bank, and not, as counsel would have it, of a sum equal to the amount of the bond. . . .

"By the said argument of counsel the object of giving the bond would be defeated. The situation was that the plaintiff board stood in no need of a bond for the return of whatever part of the deposits it was sure to recover from the bank either as a going concern or as a concern in liquidation; it stood in need of a bond for that part which would be lost unless a bond was taken; that is to say, for that part not recoverable from the bank. The bond was given to supply that need. According to the argument of counsel, it is not the balance endangered by the possible failure of the bank that is to be secured by the bond, but some part not in danger of being lost, so that, after the surety company has paid this part not in danger of being lost,

it is to be entitled to be reimbursed by the bank. The argument will not hold water; it but renews the question long ago settled in the civil law as to what is to be the effect or operation of a bond given to secure part of the debt either already created or to be created. . . .

"We conclude that the surety company was not entitled to come in competition with the plaintiff board against the dividends to accrue from the liquidation of the bank for the reimbursement of the amount paid on the bond, . . . "

Knaffl v. Knoxville Banking & Trust Co., 133 Tenn. 655, 182 S. W. 232, strongly supports the position for which we contend. The bank involved in that case gave the City of Knoxville a depository bond with one Bacon as one of its sureties. Bacon paid the penalty of the bond upon failure of the bank but did not discharge the bank's entire liability to the city. The conditions of the bond were substantially the same as the conditions of the National's bond to Groesbeck. Upon payment of the penalty of his bond Bacon sought judgment allowing him pro tanto dividends. Observe the Tennessee court's language in support of its ruling denying Bacon relief:

"In the present case Bacon was not liable for the debt beyond the amount of his bond but the obligation to pay the bond was conditioned that the bank should 'well and truly keep all sums of money deposited by the city and pay over the same and each and every part thereof'. So that the bond was an obligation limited to $25,000.00 but conditioned that the bank should well and truly keep all sums of money and pay over the same and each and every part thereof. *The full amount of the bond has been discharged by the surety but the condition expressed has not been complied with.* The bank has not well and truly kept all sums of money deposited with it and paid over each and every part thereof. *The principal liability still exists in part, though the surety has paid the penalty of the bond. This, however, did not satisfy the creditors' demands against the principal, which was to determine the liability on the bond. The amount of the liability is satisfied so far as Bacon is con-*

cerned, but the cause and determination of that liability is not satisfied in full."

" . . . Had it chosen to do so, the city might have deferred action on the bond until it had received the last dollar from the receiver, and then it could sue the surety on the bond and recover the full amount of the penalty, not exceeding the total debt unpaid. But the city did not have to exhaust the assets of the principal before a recovery from the surety. The fact that it recovered judgment and received payment from the surety before exhausting the principal does not alter the case. . . .

"The fault in the reasoning is readily seen when it is considered that the obligee may first apply all that the principal obligor can pay, and then resort to the bond for any amount left unpaid not exceeding the amount of the penalty; for it is the final amount left unpaid by the principal which is intended to be secured by the surety."

We submit the two paragraphs last quoted are most cogent in support of our contention that it is the final amount left unpaid by the bank which the National's bond secured—it was for that portion of his deposit which he could not otherwise collect that Groesbeck needed protection and for which the National gave protection.

Suppose Groesbeck had never received anything from the National on account of its bond but had received all the dividends from the Bank that the receiver could pay. Suppose the dividends received had amounted to 60 per cent of his claim and he was still unpaid to the amount of $125,000.00. Suppose he then made demand upon the National for the payment of the penalty of its bond. Would the National then be required to pay Groesbeck the full penalty of its bond according to its terms or would it be entitled to withhold 60 per cent and pay only $50,000.00? In such a case the National would have no claim against the Bank or its receiver on its indemnity agreement until it paid the penalty of its bond, and by then the assets of the Bank would have been entirely exhausted by disbursement of dividends. The National's rights are neither greater nor less depending upon when it pays the penalty of its bond. Clearly in the supposed case it would be compelled to pay the penalty of its bond without recouping

anything by virtue of its indemnity agreement. Can it be, therefore, that by paying the penalty of its bond early the National can so improve its situation as to change its legal rights and recoup itself to the extent of approximately $75,000.00, one-third of it at Groesbeck's expense. The supposed case serves to illustrate clearly to just what extent the National is attempting to violate its agreement with Groesbeck and the rights of other depositors.

The point just now under review is neatly covered by the New York court in Buffalo, etc., Co. v. Title Guaranty & Trust Company, 99 N. Y. S. 883:

> "Was the guaranty of the whole debt, with a limitation on the liability of the surety? *If so, the principal may retain all the dividends, and hold the surety for the residue of the debt up to the extent of the bond. Or, was the guaranty of a limited part of the debt? If so, the dividends are to be applied to the whole debt, and the surety is entitled to a ratable deduction for the sum covered by the bond.* This distinction, although somewhat elusive, rests upon a logical basis, namely, the intention of the parties as gathered from the obligation. *The only limitation in the bond in suit is in the amount of the penalty.* The condition, for a breach of which the penalty becomes chargeable to the surety, is that the bank will repay to the plaintiff all moneys now deposited, or which may hereafter be deposited, upon call. There is no express limitation as to the amount of the deposits, and there is no ground for the inference that the deposits should not exceed the penalty of the bond. *The condition of the bond is the repayment to the plaintiff of all of its deposits and the penalty becomes effective to the extent of the amount thereof unless the condition is fulfilled.* The language of the bond, in connection with the admitted fact that the amount of moneys on deposit with the bank at the time of the execution and delivery of the bond was largely in excess of the penalty of the bond, indicates that the true engagement of the parties was to secure the plaintiff *for any unpaid balance to the extent of the penalty of the bond in case of the insolvency of the bank.*"

Finally, upon this specific point, let us direct the court's attention to its own ruling in Merrill v. National Bank of Jacksonville, 173 U. S. 131, 43 L. Ed. 640, where it is said:

> "Certainly the giving of collateral does not operate of itself as a payment or satisfaction either of the debt or any part of it, and the debtor, who has given collateral security, remains debtor, notwithstanding, to the full amount of the debt; . . .
>
> "In short, the secured creditor is not to be cut off from his right in the common fund because he has taken security which his co-creditors have not. Of course, he cannot go beyond payment, and surplus assets or so much of his devidends as are unnecessary to pay him must be applied to the benefit of the other creditors. And while the unsecured creditors are entitled to be substituted as far as possible to the rights of secured creditors, the latter are entilted to retain their securities until the indebtedness due them is extinguished. . . .
>
> "We can not concur in the view expressed . . . that 'the property pledged is in fact security for no more of the debt, than its value will amount to; and for all the rest, the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole, if no security were taken.'
>
> "*We think the collateral is security for the whole debt and every part of it, and is as applicable to any balance that remains after payment from other sources as to the original amount due; and that the assumption is unreasonable that the creditor does not rely on the responsibility of his debtor according to his promise*"

We contend that just as the collateral in the Merrill case stood behind the final unpaid balance of the debt it secured so does the bond of the National in this case now stand behind the unpaid balance due Groesbeck and his assignee, the American, on his claim against the Bank.

It was the contractual liability on the part of the surety company which the Supreme Court of Michigan had in mind in the case of Zimmerman v. Chelsea Bank, supra, when it de-

nied the right to recover on the indemnity agreement there asserted and held that the surety company by paying the penalty of its bond had not discharged its full contractual obligation but that "*its undertaking is that its principal shall repay all moneys deposited and it must be construed as a security for the whole debt.*"

Precisely on this point of contract, although the surety had paid the penalty of its bond, did the New York court in the case of U. S. Fidelity & Guaranty Co. v. Carnegie Trust Co., 164 N. Y. S. 92, refuse to allow the surety's claim based upon its indemnity agreement, without protecting the surety's obligee, since to do so "*would violate the spirit of the guaranty.*"

Upon this contractual ground most courts, Federal as well as State, have refused to permit the surety, whose guaranty was without qualification or limitation save as to penalty, to enjoy subrogation until the obligee has been paid in full.

We cite and rely upon a number of cases involving the equitable right of subrogation. These cases are not cited because of any desire to confuse subrogation and indemnity, but because in the cases referred to the courts have subjected the contract of suretyship to such searching scrutiny and have so clearly and persuasively analyzed the nature of the obligation owed to the obligee by the surety. There is no reason assigned by the Courts for the results reached in the subrogation cases which is not equally cogent in support of our position.

In Illinois Surety Company v. U. S., 226 Fed. (7 C. C. A.) 665, it is said:

> "The extent of subrogation depends upon the character of the bond. Unquestionably one may become a surety under a condition that the debt thereby guaranteed shall not exceed the penal sum, or that only so much of the credit to be extended to the principal as shall not exceed the penalty of the bond shall be within its protection. The surety under such a bond could become subrogated to so much of the claim against the principal, even though the creditor were thereby prevented from receiving the balance of his claim in full. We find nothing, however, in the statute that would authorize the court to accept a bond so limited.

> While the amount may be increased as the court may from time to time find it proper, *the object of the statutory requirement is to secure protection not for a part but for all depositors, and not for a portion but for the entire amount of their deposits; that is, for so much thereof as they may be unable to realize from the funds of the bank itself.* Under such a bond, there is no right of subrogation until the creditors shall have obtained from the principal or the surety payment not merely of the penalty but of the debtor's entire obligation."

See also Columbia Finance & Trust Co. v. Kentucky Union Railway, 60 Fed. (6 C. C. A.) 794, wherein it is held:

> "The rights of the creditor in the mortgaged property had not been extinguished by a payment of the whole debt. The payment of the whole debt for which the surety is liable is essential to subrogation. *If the surety, upon making a partial payment, became entitled to subrogation pro tanto, and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the property was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall proportionately upon the creditor and upon the surety. Such a result would be grossly inequitable. Yet this is in effect the result of the contention urged.* The equity of subrogation does not arise from the mere obligation to pay; it springs alone from payment. The liability of the surety for the remainder of the debt continued as well after as before such payment, and until the entire debt is paid the surety has no such equity as will entitle him to the active aid of a court of equity."

Of like effect is United States Fidelity & Guaranty Co. v. Union Bank & Trust Co., 228 Fed. (6 C. C. A.) 448:

> "The right of a surety on a bond to be subrogated for the obligee in a right of action against one wrongfully causing the liability is founded on payment

> by the surety to the obligee, and it does not come into existence except upon full payment of the loss indemnified against. This is because subrogation is of an equitable character, and the surety cannot be permitted to take away from the obligee, to the latter's prejudice, securities or rights in which he is still beneficially interested. Sheldon on Subrogation, Sec. 127; Musgrave v. Dickson, 172 Pa. 629, 632, 33 Atl. 705, 51 Am. St. Rep. 765. In this case, the loss of the state was $3,000, and the guaranty company paid it in full, but the loss of the city was $8,700, and the guaranty company has paid on account of it only $5,700 (as above estimated). This leaves the city with an unpaid claim of $3,000 against the clerk and the clerk's fund, and the right of action which the city originally had against the bank it was entitled to enforce and collect and to apply the full sum collected upon its claim. *The city thus had, in a very proper sense, two securities to which it might resort and upon both of which it might realize in full until its whole claim was satisfied; these securities being its right of action against the bank and its claim against the guaranty company on the bond.*"

Just so in this case, the National cannot be permitted to take away from Groesbeck a part of the assets which it, under this rule, guaranteed would remain available to him. To do so would prejudice him in the enjoyment of property in which he is still beneficially interested. So, too, in this case Groesbeck, "in a very proper sense," had two securities to which he might resort—his claim against the Bank and his claim against the National. The National cannot deprive him of recourse to either of these sources of relief until his claim is paid, for until that time the obligations of the bond remain outstanding and undischarged.

Finally, how can the present decision of the Eighth Circuit Court of Appeals be reconciled with the following statement in its former opinion in this same matter:

> ". . . Until the creditor be wholly satisfied there ought to be and can be no interference with his rights or his securities, which might, even by bare possibility, prejudice or embarrass him *in any way* in the collection of the residue of his claim. (New

> Jersey, Etc. R. R. v. Wartendyke, 27 N. J. Eq. 658.)"
>
> "The rule deducible from the cases is, that till the creditor is paid in full, no right to subrogation exists in favor of sureties who pay a part of the debt. In short, the creditor may insist on getting his full pound of flesh before others are allowed to sit at the banquet board."

Surely if the National is now to partake of the funds of the bank it is sitting at the "banquet board". What difference can it make whether access is gained to the board by subrogation or indemnity. The same rights are violated in either event.

Reference is made to the folowing cases announcing the same rule:

> Peoples v. Peoples Bros., Inc., 254 Fed. 489;
> Fidelity & Deposit Company of Maryland v. Wilkinson, 69 So. 865;
> Bank of Fayetteville v. Lorwein, 88 S. W. 919;
> McKenna v. Corcoran, 61 Atl. (New Jersey Eq.) 1026;
> Dickson v. Bailey, 33 Atl 705;
> New Jersey Midland Railway Co. v. Wortendyke, 27 N. J. Equity, 658;
> Opp. v. Ward, 24 N. E. 974;
> Featherstone v. Emerson, 14 Utah 12.

The Circuit Court of Appeals, in the Centropolis Bank case, inferentially sets aside the cases upon subrogation with the observation that it is concerned with the surety's rights not to subrogation but to indemnity. That distinction does not, however, answer either in part or in whole the argument upon which the foregoing subrogation cases are decided, to-wit, that where the surety has not expressly limited its guaranty to the penalty of its bond although its requirement to pay may be limited by such penalty, *its guaranty remains outstanding and remains a continuing contractual obligation after the penalty has been paid and until the obligee's debt or deposit is paid in full.* The contract of the surety is identical whether analyzed and determined in a subrogation case or an indemnity case. Since the vital question is what is the surety's contract, what are the surety's obligations, and since

these questions are analyzed and decided in the subrogation cases, the court does not with good reason in the Centropolis Bank case dispose of such subrogation cases by asserting this is a case of indemnity and not one of subrogation.

The question here is what is the contract between the National and Groesbeck? Once that is clearly determined this case is easy of solution. If we read the decisions correctly the National's contract is not simply an agreement to pay the penalty of its bond. It is also a guaranty of Groesbeck's entire deposit. The latter obligation and the legal liability in connection therewith continued as well after as before the National paid the penalty of its bond. This has been repeatedly held in numerous decisions both State and Federal. It does not militate against the authorities here cited that some of them involve questions of subrogation as well as of indemnity. The National's contract is the same and so is every other surety company's contract the same whether that contract is reviewed in a subrogation or in an indemnity case. Insofar as the subrogation cases cited go to an analysis of what the surety company's contract is and point out that such contracts embrace not simply an obligation to pay the penalty of the bond but also include a guaranty of the entire deposit, it is submitted they are in point and are entitled to the serious consideration of this court.

The authorities are overwhelming to the effect that a contract such as the National has executed is not discharged by mere payment of the penalty of the bond and that, in the language of the Sixth Circuit Court of Appeals in Columbia Finance & Trust Company v. Kentucky Union Railway, supra, "the liability of the surety for the remainder of the debt continued as well after as before such payment."

It is precisely this contractual ground which the Circuit Court overlooked in its decision in the Centropolis Bank case. The court in that case used the following language:

> "We think that a construction of the bond in the instant case in accordance with the above rule compels the conclusion that it was the intention of all the parties to the contract that the Surety Company should be liable to the county for all of the principal of the county's deposit, together with interest thereon, up to and including, but not exceeding, the sum of $50,000.00, and that the recital in the

> bond that the penal sum thereof is $50,000, just as effectually limits the language of the condition as if there had been written into the language of the condition itself the words 'up to and including but not exceeding $50,000.' It is true that the liability under the bond was not limited to any particular portion of the whole deposit. In that sense, the bond was security for the whole deposit, and for that reason the right of subrogation does not exist, but the maximum amount for which the Surety Company could be held liable thereunder was expressly fixed at $50,000.
>
> The Surety Company has discharged that liability by payment in full. The county has received all that it contracted for from the Surety Company. How then can the county say that the spirit of the guaranty will be violated? *We find nothing in the language of the bond which justifies the contention that the claim of the county upon its contract of deposit should be given any priority over the claim of the Surety Company upon its contract.*"

This reasoning and particularly the concluding sentence fails to take account of the contractual barrier which has prevented the courts in all of the foregoing cases from allowing the relief to the sureties there which was allowed in the Centropolis case and which the Circuit Court would grant the National here. If this contractual barrier does not exist in the present case and stand as an obstacle to the National's recovery then it is submitted that all of the foregoing cases discussed herein have been incorrectly decided.

If the National's bond guaranteed Groesbeck's entire deposit as a matter of specific contract then certainly until that specific contract has been carried out and Groesbeck's entire deposit has been paid the National is not entitled to receive anything either by way of subrogation or of indemnity.

Either the bond of the National was security for Groesbeck's whole deposit or it was not. If that bond was not security for the whole deposit but only for $125,000.00 of said deposit, then the Circuit Court in the previous case should have allowed the National to enjoy subrogation to that extent since by paying the $125,000.00 it would have paid the entire debt for which its bond was security.

If, on the other hand, the bond was, as the Circuit Court previously held, security for the whole deposit so as to prevent subrogation then that guaranty in the National's bond likewise bars it *as a matter of contract* from receiving anything by virtue of its indemnity agreement, until Groesbeck's debt has been paid in full. The same principle of contract law and the same obligation of contract is the effective bar to the surety's recovery in each instance and this, as we understand it, is the reasoning back of the decision by the Fourth Circuit Court of Appeals in the case of Maryland Casualty Company v. Fouts and of the Supreme Court of Michigan in the case of Zimmerman v. Chelsea Savings Bank. We submit that the first decision of the Circuit Court settled the contract question. That decision should have been held to be decisive of the present litigation, and therefore, when the Circuit Court permitted a recovery by the National under its indemnity agreement it in effect overrules its previous decision and robs the previous decision of the sound basis upon which it rests, to-wit, the proposition that the National's bond as a matter of contract guaranteed and stood behind the treasurer's entire deposit.

The limited rights which the National has in this case spring from payment. It could enjoy no rights by way of subrogation without payment; it could enjoy no rights by way if indemnity without payment. The authorities are all to the effect that even if the National had secured no express contract of indemnity from the Bank the law, upon payment, would imply such an agreement on the part of the Bank. Can it possibly be that the National, seeking relief by subrogation, can be successfully confronted by the barrier of its outstanding and unperformed guaranty of Groesbeck's whole deposit, and that it can then pursue indemnity and avoid this same contractual barrier? Why should the contractual ground not be as effective and complete an obstacle to its recovery in the one case as in the other?

ANALYSIS OF CASES RELIED ON BY CIRCUIT COURT OF APPEALS IN CENTROPOLIS CASE.

Since the Circuit Court of Appeals allowed the question of the respective rights of the parties herein to rest upon a reference and adherence to its opinion in the Centropolis Bank case, it becomes necessary to consider and analyze the authorities therein relied upon. As we understand it, the

Circuit Court of Appeals in the Centropolis Bank case, in determining the contractual relationship of the parties and in construing the surety's bond and especially in determining the scope of its guaranty, elected, in the face of all the foregoing authority, to follow and rely upon the following cases:

American Surety Co. v. National Bank of Barnesville, 17 Fed. (2d) 942;

U. S. Fidelity & Guaranty Co. v. Carnegie Trust Co., 164 N. Y. S. 92, 117 N. E. 1086;

In Re Daily and Ivins, 19 Fed. (2d) 95.

We believe an examination of the three cases will satisfy this court that they fail to sustain the decision of which we are here complaining.

The case of American Surety Company of New York v. National Bank of Barnesville, supra, was decided by the District Court for the Southern District of Ohio. There the bank, prior to its failure, became the depository for school funds and in order to secure such deposit executed a bond, with the American Surety Company as surety, to the Board of Education in the sum of $6,000.00. The application of the bank contained the usual indemnity agreement in favor of the surety company. At the time of its failure the net indebtedness to the Board of Education was $16,030.47. Upon the bank's failure the surety company paid the full amount of its bond, $6,000.00, to the Board of Education and thereupon filed its bill in equity asserting rights, both by way of subrogation and indemnity.

In its opinion, the court rather elaborately discusses the question of subrogation and refers to numerous decided cases on that point and then concludes that since the whole debt of the Board of Education has not been paid the surety company is not entitled to any rights by way of subrogation. It then proceeds, in the face of such a conclusion, to direct the receiver to deduct from the School Board's claim an amount equal to the penalty of the surety's bond and to allow the surety's claim for that amount, and to further direct the receiver to recover from the School Board "any and all sums paid to it as dividends upon the said amount of $6,000.00." Here then we have the anomalous situation of a court deciding that the surety could not enjoy rights by way of subrogation as a matter of law and then proceeding as a matter of fact to allow and direct that it be given such rights.

The decision of the Ohio District Court is squarely against the previous holding of the Eighth Circuit Court of Appeals in the first case between the parties to the instant suit, which denied the National any rights by way of subrogation; and which refused to in any manner reduce Groesbeck's claim or the dividends he looked to for its payment until he was fully reimbursed.

Not only is the opinion of the Ohio District Court in the Barnesville case at variance with the previous holding of the Eighth Circuit Court of Appeals in the first case between these parties, but also it is contrary to the uniform holding of **the courts and is clearly erroneous.**

A fatal objection to the Ohio case, as we view it, is that it is in conflict with the decisions of this court in Merrill v. National Bank of Jacksonville, supra, and Chemical National Bank v. Aldrich, 176 U. S. 618; 44 L. Ed. 611. The claim of the School Board was $16,030.27. As security for payment of that claim the Board held the bond of the surety company in the sum of $6,000.00. While the penalty of the bond was limited to $6,000.00 the bond contained the guarantee on the part of the surety that the bank would repay *all money* to the Board. Under the decisions of this court the Board was entitled to have its claim approved and allowed and to receive dividends on the full amount thereof without any deduction by reason of any security or collateral which it held.

United States Fidelity & Guaranty Co. v. Carnegie Trust Company, supra, likewise does not support the proposition for which it is cited by the court in its opinion in the Centropolis Bank decision, but in its result is favorable to the contention of the petitioners herein.

There the surety brought suit against the superintendent of the defunct bank, asserting that since it had paid the penalty of its depository bond to certain bankruptcy creditors whose funds had been deposited there, it was entitled either to subrogation to the rights of such creditors or to have its general claim based upon its indemnity agreement allowed. The lower court refused to allow the surety company to share in the dividends to the injury of the bankruptcy creditors on the ground that such action would violate the spirit of the guaranty. On this specific point the court, at page 93, uses the following language:

> "It is not necessary to determine whether or not the claim of the plaintiff can be allowed in such a way

> as to *diminish* the dividends which would otherwise accrue to the bankruptcy creditors. It is contended that such effect cannot be given, *because it would violate the spirit of the guaranty.* The Special Term has so held, and has made full provision for the protection of the bankruptcy creditors in the judgment appealed from, and from this judgment the plaintiff has taken no appeal."

The language just quoted is from the prevailing opinion of the Court and not from the dissent as the National states at page 40 of its brief opposing granting of writ of certiorari.

In Re Dailey and Ivins. This is a case involving the proof of claims in a bankruptcy matter and this Court has held such a case is not in point in a case involving proof of claims against a receiver of a national bank.

> "The bankruptcy rule which requires the holder of collateral security to exhaust it and credit the proceeds on his claim, or else to surrender it before he can prove his claim, is not adopted for national banks by U. S. Rev. Stat. 5236, providing for a ratable dividend on claims proved or adjudicated." Merrill v. National Bank of Jacksonville, 173 U. S. 131; 43 L. Ed. 640.

We urge, therefore, that the three cases cited in the court's opinion as countervailing Maryland Casualty Co. v. Fouts and Zimmerman v. Chelsea Bank wholly fail, upon analysis, to have any such countervailing force. The Carnegie Trust case, by express reservation, leaves out of consideration the point to which it was cited by the National and an examination of the dissenting opinion discloses that the ultimate effect of the case is in our favor and against the National. The Barnesville case is one wherein subrogation and not indemnity is actually granted contrary to the opinion of the very court which granted it and contrary to the law as settled by this court in the Merrill and Aldrich cases. The Dailey-Ivins case is a bankruptcy case governed by rules peculiar to bankruptcy practice.

II.

DOCTRINE OF RELATION BACK ERRONEOUSLY APPLIED.

The holding that the National may receive dividends from the assets of the Bank before Groesbeck is paid in full was made to rest in this case upon the decision of the Circuit Court of Appeals in United States Fidelity & Guaranty Company v. Centropolis Bank, supra. In that case the court held that a depository surety upon the payment of the penalty of its bond is entitled to compete with the depositor whom it secures even before the depositor is paid in full. This conclusion was reached by resort to the so-called doctrine of relation back.

As applied to this case that doctrine means that while the National did not pay the penalty of its depository bond until several months after the failure of the Bank, nevertheless the relation of debtor and creditor existed from the time the bond was executed and that upon payment of the penalty all rights growing out of such payment related back to the date of the execution of the bond. The court held that this doctrine applied in this case with such force as to give the National the character of a creditor of the Bank as of the date it executed its depository bond to Groesbeck and to clothe it with the right to compete with Groesbeck in the assets of the failed bank even before Groesbeck is made whole.

Any rights which the National has against the receiver arise from the contract between the National and the Bank and to that agreement Groesbeck was not a party. As to that agreement Groesbeck is a third person who has acquired lawful rights against both parties thereto. The Bank as principal and the National as surety agreed to protect Groesbeck from loss. We contend the doctrine of relation back cannot be applied in favor of the National so as to deprive Groesbeck, an innocent third person, of the rights he had acquired against the National and the Bank.

The right of relation back is not one which the surety may enjoy at all events. It "is a legal fiction invented to promote the ends of justice. . . . and it is never allowed to defeat the collateral rights of a third person lawfully acquired." It is invoked by courts of equity to assist only in cases when the witholding if its application would defeat the ends of justice.

In holding that the right of relation back is available to the surety at all events, the Circuit Court of Appeals, we submit, departed from the law as settled by this court in United States Fidelity & Guaranty Company v. Wooldridge, 268 U. S. 234, 69 L. Ed. 932.

In the Wooldridge case the surety company furnished a depository bond to the Gulf, Colorado and Santa Fe Railroad to secure the railroad against loss on account of its deposit in the Cleburne National Bank. The surety company had also furnished a fidelity bond to the Cleburne Bank to protect the bank against the misconduct of its cashier. The bank failed and the surety paid the Railroad the amount of its deposit for which it took an assignment of the Railroad's claim against the Bank's receiver.

Suit was brought by the receiver against the surety on the fidelity bond. In that action the surety relied upon its rights arising from the payment of the depository bond and attempted to set off such payment against the receiver's claim on the fidelity bond. In support of its claim to the set-off the surety company relied upon the doctrine of relation back. If, as the Circuit Court of Appeals held in this case, the doctrine of relation back is available to the surety at all events, the claim of set-off in the Wooldridge case would have been a good defense. This court, however, rejected the application of the doctrine and in concluding its opinion said:

> "The doctrine of relation 'is a legal fiction, invented to promote the ends of justice, and . . . it is never allowed to defeat the collateral rights of third persons lawfully acquired'."

This Court's opinion in the Wooldridge case finds support in Johnston v. Jones, 1 Black, 209, 17 L. Ed. 117, wherein this court says in part:

> "The counsel for the plaintiff in error insists that the deed from Robert A. Kinzie to Johnston related back to the date of the title bond from Kinzie to Hubbard, and that this was a new element in the case, which required a change of the rule, as to the point of time to which the attention of the jury should have been directed. We do not think so. The doctrine of relation cannot be made to work such a result. *It is a legal fiction, invented to pro-*

> *mote the ends of justice. It is a general rule, that it shall do no wrong to strangers.* It is applied with vigor between the original parties, when justice so required; but *it is never allowed to defeat the collateral rights of third persons, lawfully acquired.* Jackson v. Bard, 4 Johns. 234; Case v. DeGoes, 3 Cai. 262; 18 Vin. Abr. 287, Relation, B: Menvil's case, 13 Coke, 21; Wood v. Ferguson, 7 Ohio St. 291."

The holding of this court upon the doctrine of relation back has been followed by the Supreme Courts of North Dakota, Minnesota and Michigan and by the Circuit Courts of Appeals for the Sixth and Ninth Circuits. We have been unable to find any case except the Centropolis Bank case where a court has permitted the application of the doctrine to interfere with the rights of innocent third persons. The Sixth Circuit Court of Appeals in Springfield National Bank v. American Surety Co., 7 Fed. (2nd) 44, had before it a case where the surety company undertook to set-off a claim of indemnity growing out of the payment of a depository bond against a claim asserted by the receiver of a failed bank on a fidelity bond.

In that case, as in the case at bar, the bank in its application for the bond agreed to "indemnify and keep indemnified" the surety against any loss sustained on account of the execution of the depository bond and that agreement was asserted in that case just as it was asserted in this case. It is significant, however, that in the Springfield National Bank case the surety had not only paid the penalty of its depository bond, but the entire claim of the depositor. That case presented a situation where the entire loss indemnified against had been met, but even then the court refused to apply the doctrine of relation back. The court in that case held that the surety company's "potential liability on the depository bond was converted into a claim against the bank when and not until the bank becomes insolvent and unable to repay the state." The court further said:

> "To permit the performace of that obligation—payment of the deposit bond—to defeat a separate surety obligation would eventuate in an unfair distribution of the bank's assets among its creditors."

The Ninth Circuit Court of Appeals followed the same reasoning and reached the same result in Fidelity & Deposit Company of Maryland v. Robinson, 7 Fed. (2nd) 371.

We invite the Courts attention to the following cases wherein the holding is to the same effect:

Storing v. Stutsman, 210 N. W. 653, at 655-6;
Veigel v. Converse, 210 N. W. 162;
Gilbertson v. Northern Trust Co., 207 N. W. 42 at 46;
Zimmerman v. Chelsea Bank, supra.

The holding in the cases just cited to the effect that the date of insolvency of the bank is the date to which resort must be had in fixing claims against the receiver finds support in the case of Merrill v. National Bank of Jacksonville, supra, wherein this court in part says:

> "The distribution is to be 'ratable' on the claims as proved or adjudicated, that is, on one rule of proportion applicable to all alike. In order to be 'ratable' the claims must manifestly be estimated as of the same point of time, and that date has been adjudged to be the date of the declaration of insolvency."

The holding that the doctrine of relation back is a legal fiction invented to promote the ends of justice and will never be allowed to work an injustice against innocent third parties becomes at once applicable to this case when the court understands that not only has Groesbeck and the American, his assignee and subrogee, not been made whole but likely never will be.

The fallacy of the National's contention that it is entitled to stand on the same basis as general depositors of the Bank and to now participate with them in the Bank's assets is disclosed by the fact that its payment to Groesbeck in no way increased the assets available for division among depositors generally.

If the penalty of the National's bond had been paid to the Bank or its receiver instead of to Groesbeck the National would be in the same position as others who put money in the bank. Or, if the National's payment to Groesbeck had extin-

guished the claim of Groesbeck so that the bank's assets were relieved of his claim to the benefit of general depositors, then the National's position might be different.

But under Merrill v. National Bank of Jacksonville, supra, and Aldrich v. Chemical National Bank, supra, Groesbeck, notwithstanding the National's payment, is not required to reduce the face of his claim but is entitled to continue to draw dividends on the full amount thereof until he is wholly repaid.

However, there is no prospect of Groesbeck ever being wholly repaid, certainly not unless the decision herein complained of is reversed. Therefore the National's payment to Groesbeck can never inure to the benefit of depositors generally.

It is inequitable to apply the doctrine of relation back in favor of the National because:

1. The National has contributed nothing to the assets of the Bank.

2. The National's payment to Groesbeck has not reduced the outstanding claims against the Bank nor has it resulted in any benefit to any depositor except Groesbeck. It is therefore inequitable to permit the National to become a creditor along with general depositors as of the date of the Bank's failure.

3. As against Groesbeck, it is inequitable and illegal for the National to enjoy dividends at his expense because it violates the promise of the National contained in its bond.

It is unjust for Mr. Groesbeck, who is liable to the American Surety Company for the final deficit herein, to have this case decided upon authority of the Centropolis Bank case. The doctrine of relation back though erroneously applied was applied in the Centropolis Bank case with less violence to the equities of Jackson County than will be the case with Groesbeck if applied here. Jackson County's deposit was $122,-324.59. It received $100,000.00 from depository sureties and had its claim against the receiver allowed for the full amount. Dividends amounting to as little as 20 per cent on that claim would wholly repay Jackson County. The situation in which Groesbeck finds himself is much more unfortunate. Jackson County will doubtless be paid in full even in the face of the

application of the doctrine of relation back, while Groesbeck, in the face of such application, is certain to lose many thousands of dollars.

If by recourse to the doctrine of relation back the National is to be permitted now to recover $75,000 of the $125,000 paid on account of its bond, while Groesbeck is still unpaid, then the doctrine of relation back will have been employed not to promote the ends of justice but to absolve the surety company from the obligation of its contract and to "defeat the collateral rights of third persons, lawfully acquired."

Only by the erroneous application of the doctrine of relation back could the court reach its conclusion in the Centropolis Bank case. Since that doctrine can have no application to such a case as this it follows that with the rejection of the doctrine the decision herein must be reversed.

The National was not a creditor of the Bank at "the date of the declaration of insolvency" and since this court has held that that is the controlling date, the Eighth Circuit Court of Appeals erred in holding that the National can share with those who were creditors and depositors upon that date. Herein lies the fundamental error in allowing the National to share with those who were general creditors and depositors at the time the Bank closed its doors.

III.

COURT'S DECISION WILL RESULT IN UNFAIR DISTRIBUTION OF BANK'S ASSETS AMONG ITS CREDITORS IN VIOLATION OF NATIONAL BANKING ACT

The National Banking Act (R. S. 5236 Section 194, New U. S. Code, Annotated) requires that dividends to creditors of the bank shall be ratable and without preference. The penalty of the National's bond never went into the assets of the bank for ratable distribution to its creditors and if the decision of the Circuit Court of Appeals shall finally result in payment of dividends to Groesbeck on the full amount of his deposit and also to the depository sureties upon the full amount of their bonds, then there is to be paid on account of Groesbeck's deposit an amount disproportionate and unfair to general creditors. Such decision establishes a preference

in favor of Groesbeck's deposit to the detriment of other depositors of the bank and violates the intention of Congress as expressed in The National Banking Act. It should be noted that in the Centropolis case the court was dealing with a failed state bank and not a national bank.

At the time the bank failed Groesbeck had on deposit the sum of $643,094.29 for which amount (less $75,000.00 assigned to Fidelity and Deposit Co.) he was entitled under the law to have his claim allowed and approved. He was entitled to receive dividends on the full amount without regard to any collateral which he held. Merrill v. National Bank of Jacksonville, supra.

But, if his depository sureties, after the insolvency of the bank, are entitled to pay the penalties of their bonds and then receive dividends pro rata on the amounts paid, the effect will be that Groesbeck's deposit will draw dividends from the assets of the bank upon its full face value, plus the amount of any depository bonds which he held. This would give his deposit a dividend earning capacity proportionately greater than the dividend earning capacity of other deposits, resulting in a preference against depositors in general and an unfair distribution of the bank's assets.

Clearly to allow the National Surety Company to recover upon its indemnity agreement will "eventuate in an unfair distribution of the Bank's assets among its creditors." A simple case will serve to illustrate the situation. Assume ten individuals constitute all the depositors in a bank upon its failure and that each of the ten has $10,000.00 upon deposit. One would naturally assume under such a state of facts that each of the ten depositors would share equally in and receive one-tenth of the dividends paid by the receiver. If, however, one of the depositors was a custodian of public funds, as in this case, and had taken the precaution to secure a depository bond, then that $10,000.00 deposit under the decision in this case, would receive dividends not simply on such $10,000.00 deposit but also would receive dividends on the additional amount paid in connection with such deposit under the depository bond. In other words, that $10,000.00 deposit, if the depository bond were in the sum of $5,000.00, would draw dividends based on once and a half the amount of the deposit: first, upon the depositor's claim, and, second, upon the indem-

nity contract. The result would be that the other nine depositors would not receive the proportion of the dividends paid which their deposits bear to the total of bank's deposits; and where, as in this case, the depository bond is for a large sum, the "unfair distribution of the bank's assets among its creditors" becomes even more disproportionate. If the law of this case is permitted to stand, the liabilities of a bank will not have a direct relation to its deposits, and depositors will not share equally and in proportion to their deposits, but dividends will be distributed on the basis of deposits plus liability by virtue of indemnity agreements given by the bank in connection with depository bonds.

Appreciation of this resulted in the Sixth Circuit Court of Appeals in the case of Springfield National Bank v. American Surety Company of New York, supra, holding that to allow the claim of the depository surety "would eventuate in an unfair distribution of the bank's assets among its creditors."

If the rule announced by the Eighth Circuit herein is to stand then in the future dividends of failed national banks will not be distributed ratably among depositors; but among depositors and depository sureties. It may easily result, depending upon the number and character of depository bonds taken, that depositors whose deposits aggregate a million dollars may have to share dividends in the event of failure with depository surety companies for an additional 25 or 50 per cent of that amount. This will be most unjust to the ordinary depositor when it is remembered that not a dollar of that additional amount has gone to swell the assets of the failed bank. It is an unfair rule to depositors.

Surety companies, if they desire dividends immediately upon payment of the stipulated penalty of their bonds, may and should contract for conventional subrogation as the Fidelity & Deposit Company did in the instant case. Any other rule is harsh and unreasonable and works unfairly to the ordinary depositor as well as to the obligee of such depository surety. The rule announced makes for an unwarranted increase in the liabilities of the bank after insolvency and in favor of parties who have contributed nothing to the assets of the failed bank.

IV.

DECISIONS OF EIGHTH CIRCUIT COURT OF APPEALS IN THE TWO CASES INVOLVING THIS SAME MATTER CONFLICT.

The decision of the Circuit Court of Appeals of which we complain is in conflict with its decision in the former case between these same parties involving this same fund.

By the decree in the first case it was held that the American, as assignee and subrogee of Groesbeck, should receive all dividends accruing on account of Groesbeck's claim until the American and Groesbeck were made whole; that until such time the National should receive nothing.

The National argues that the first decree does not specifically and in so many words deny its right to participate in the assets by force of its indemnity agreement. But the Circuit Court's decision in the first case affirmed the District Court's decree denying the National the right to in any manner deplete the funds out of which Groesbeck and the American were to be made whole until they had been paid in full. Any other construction renders the first decree ineffectual to accomplish its purpose. If the first decree prevented participation in the funds by the National until Groesbeck and the American are made whole, it would be ineffectual if it left a way open for the National to enter by any other avenue and thereby deplete the funds in the hands of the receiver to Groesbeck's and the American's detriment. We contend that the first decree denied the National the right to participate in the funds in the hands of the receiver until Groesbeck and the American were wholly paid, while the present decision of the Circuit Court authorizes the National to compete with Groesbeck and the American in the enjoyment of the same fund.

If we are correct in this position then it becomes at once apparent that both decisions cannot be given full force and effect and if the second decision is to become final, the effect of its becoming final is to nullify its first decision. The first decree, affirmed by the Circuit Court, became final before this case was filed and the Circuit Court of Appeals had no jurisdiction or power to thereafter reverse or modify it.

There is a second ground of conflict between the first and second decisions of the Eighth Circuit Court in this matter. The second decision in this case, as well as that in the Centropolis Bank case, is opposed to fundamental principles of suretyship law which were recognized and approved by the Eighth Circuit Court of Appeals in its first decision, and to that extent and in that respect the second decision is squarely in conflict with the previous decision of that court in this same matter.

It is well established that the rights of a surety can never rise above those of its principal:

> "The surety has no rights superior to those of the principal and cannot enforce a lien which the latter could not have enforced." (37 Cyc. 429).

> "The surety cannot be placed in a more favorable position than the principal." (37 Cyc. 429).

In the first decision by the Eighth Circuit Court of Appeals between these parties that court in its opinion affirmed the foregoing principles and in that connection observed (R. 115):

> "Obviously the Bank cannot complain of its own fraud nor can its surety for ordinarily 'a surety cannot be placed in a more favorable position than the principal'." (37 Cyc. 429).

The application of this principle to the present situation is fatal to the claim of the National that it is entitled to dividends upon its indemnity agreement with the Bank before the Bank has paid to Groesbeck the whole of his deposit. As between Groesbeck and the Bank there can be no argument as to the treasurer's superior right to be paid in full from the assets of the Bank before the Bank can claim anything for its stockholders, and since the National, as surety, cannot be placed in a more favorable position than its principal *this case is effectually reduced to the simple proposition that the National cannot enjoy rights with respect to moneys available for dividends if the bank could not enjoy them.* The National is, therefore, in effect, arguing in this case that to the extent of its claim for dividends, under its indemnity agreement, the Bank *has a right to share with Groesbeck in the moneys*

available for paying dividends; and this before Groesbeck has been paid in full.

The Bank not only guaranteed payment to Groesbeck of his deposit, but indemnified him against loss on account thereof. Once this case is reduced to its simplest terms it is found, by application of the foregoing principle, to be nothing more than a contest between the Bank and Groesbeck, with the National asserting rights under a contract with the Bank, superior to what the Bank itself could assert. If the National cannot be placed in a more favorable position than its principal, the bank, then it would seem clear that the National cannot assert rights to any dividends by virtue of its indemnity agreement with the Bank until Groesbeck has been paid in full.

V.

RES JUDICATA.

The Circuit Court of Appeals erred in holding that the subject matter of this suit was not adjudicated in the first suit between these parties. As a defense to this action the petitioners herein pleaded that the issue of reimbursement was res judicata and had been disposed of by the decision in the first case which was affirmed on appeal by the Circuit Court. The District Court sustained this special defense and its ruling in that connection was assigned and held to be error by the Circuit Court of Appeals.

It will be remembered that the National came into the first suit as an interpleaded defendant. Its complaint in intervention was sworn to (R. 86, 93) and the twelfth paragraph thereof alleges the indemnity agreement between the National and the Bank, and further alleges that the National, following the payment of the penalty of its bond in the sum of $125,000.00, "duly presented its claim in said amount arising out of said bond to said defendant receiver." (R. 90, 91).

Paragraph 5 of the National's prayer in its said complaint in intervention is as follows:

> " '5. That the claim of the National Surety Company against said defendant receiver in the sum of $125,000.00 arising out of the promise and agreement of said National City Bank to indemnify and

> to hold said National Surety Company harmless and to reimburse it for any loss on account of its execution of said bond in the sum of $125,000.00 be *allowed* and *approved* and the *defendant receiver ordered to pay to said National Surety Company dividends thereon.*' "

This is not a prayer for subrogation; but a distinct demand for relief by way of indemnity; a demand for the allowance and approval of its indemnity claim and the payment of dividends thereon.

The American filed an answer to the complaint in intervention of the National (R. 95, 98) and in paragraph 8 of that answer the American denied paragraph 12 of the National's complaint in intervention, and challenged its right to recover upon the alleged indemnity agreement now relied upon. Thus we find the National asserting upon its entrance into that case the same indemnity agreement upon which it now relies and praying for the same identical relief which it now seeks.

The allegations of the National's complaint in intervention and the denials of the American's answer squarely put in issue in the first case the right of the National to recover under its indemnity agreement reimbursement as prayed for,—the sole and identical issue involved in the present case.

Upon the trial of that action the National introduced in support of its claim the alleged indemnity agreement upon which it now relies. (R. 117, 122). It was stipulated that the National is now relying upon the same bond, the same indemnity agreement, and upon the same payment of $125,000.00 as were involved in the prior suit. (R. 122).

In the first claim filed with the receiver by the National it demanded not only that it "be subrogated to the rights of the obligee on the above mentioned bond against the funds or estate of the National City Bank of Salt Lake City, Utah," but also "that it be reimbursed for the payment heretofore made to the obligee as above set forth." (R. 99, 105, 106). In presenting that claim at the first trial counsel for the National, after referring to the other documents which made up the exhibit, added "then the claim itself wherein it is recited that the claim is made against the National City Bank for reimbursement and for subrogation." (R. 106). Immediately after the decree in the former suit was affirmed, the National

re-filed its claim with the receiver eliminating the demand for subrogation but re-affirming its demand for indemnity.

It was stipulated that all the parties to this suit were parties to the prior suit (R. 117). There is, therefore, no question under the plea respecting the identity of the parties.

Upon the conclusion of the trial of the first suit the District Judge made and entered his decree, (R. 108), finding "the issues in favor of the plaintiff" and holding in effect that the National was not entitled to receive anything until after the American, as assignee and subrogee of Groesbeck, had been made whole (R. 108-9). That decision was affirmed by the Circuit Court of Appeals on March 27, 1925. (R. 110, 116—5 Fed. 2nd 34). The briefs and record upon the appeal in that case, made a part of the record in this case, leave it beyond doubt that the National not only asserted its alleged indemnity agreement as the basis for relief in the first action, but insistently emphasized its right to recover dividends thereon.

In its appeal in the first case the National, in its eighth assignment, assigned as error the failure of the trial court "to order, adjudge and decree that the claim of the National Surety Company against said defendant receiver in the sum of $125,000.00 and interest from June 5, 1922, at the rate of eight per cent per annum, should be allowed and approved." (R. 136). Elsewhere in said assignments the National re-asserted its right to reimbursement by reason of the indemnity agreement given it by the bank. (R. 138).

In its printed brief upon that appeal the National strongly emphasized the indemnity agreement and in making its legal argument gave first consideration to "the legal right of this appellant against said bank arising out of contract," asserting in part:

> "The answer of the appellant concludes with a prayer that its claim against said defendant receiver arising out of the contract of said National City Bank to indemnify and hold it harmless and to reimburse it for any loss on account of its execution of said bond, be allowed and approved, and the defendant receiver ordered to pay this appellant dividends thereon. . . . However, we wish to say at the outset of this argument, and most emphatically, that we rely foremost and primarily upon our

> legal right of reimbursement, based upon the rights acquired and reserved by this appellant and given to it by said Bank as the inducement and consideration for its execution of said bond. . . . 'The claim of this appellant arising out of said contract with said bank should have been allowed and approved by the trial court, and the Receiver directed to pay to it dividends thereon.' (Assignment of Error No. 8, R. 126). . . . We fail to see how there can be any question of our legal right to recover from said receiver, based upon said contract of indemnity. At the time of the failure of the bank, this claim was valid and outstanding obligation against the bank upon which a claim may be properly asserted against the Receiver, just as on any other debt of the bank. Such a claim would be provable in bankruptcy or against an estate, and why not against the receiver of this Bank? However, it may be said that this appellant, independent of its indemnity agreement, has the right of subrogation. That may be true, but at the same time such right of subrogation cannot detract from our legal rights.
>
> " . . . The decree complained of herein operates to defeat the legal rights of this appellant against its principal, the said Bank, as well as to work an injustice to the superior equities of this appellant. . . .
>
> "It is therefore most respectfully submitted, that the decree of the trial court herein be reversed, and that a decree be entered herein that the claim of the National Surety Company against said Receiver in the sum of $120,000.00, and the claim of American Indemnity Company against said Receiver in the sum of $5,000.00, be allowed and approved; that the *Receiver of said National City Bank be directed to pay to each of said* appellants dividends on their respective claims. (R. 142-146)."

An examination of those portions of the National's briefs upon the first appeal, which appear in the record beginning with page 138 and continuing to page 147, will disclose numerous and vigorous assertions on the part of the National to the

effect that it was entitled in that action to recover dividends upon the indemnity agreement upon which it now relies. We invite particular attention to them. They show clearly that the National vigorously asserted the right to recover by way of indemnity, independent of subrogation, before the Circuit Court of Appeals.

Our contention that the National's cause of action based upon its indemnity agreement was adjudicated in the first action and that the decree in the firse case is a bar to a subsequent suit upon the same indemnity agreement is, we think, amply supported by the authorities.

This court in Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195, in part said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

The parties to this suit and in the former suit are the same. The National in the former case alleged the same indemnity agreement it relies upon here. It prayed for the same relief in the former case for which it prays here. It offered in the former case exactly the same evidence in support of its right to indemnity which it offers here. There is, therefore, in the two suits an identity of parties, an identity of claims asserted and an identity of proof to support the claims. It may be asserted that it was not necessary in the former action to adjudicate the National's rights under its alleged indemnity agreement. As we have pointed out elsewhere herein, however, it was necessary to determine the rights of the National under its alleged indemnity agreement in order to make the

adjudication of all the issues involved in the former suit complete and to make the decree rendered efficacious.

There is here present every element which has led courts to a finding of identity of causes of action in cases involving res judicata.

We invite the attention of the court to the following statements of the law upon the subject:

> " 'It is well settled that a valid final judgment or decree, upon the merits, constitutes an absolute bar to a subsequent action or suit between the same parties upon the same claim or demand. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Except in special cases, the plea of res adjudicata applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time . . . The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the groundwork upon which it must have been founded. . . .
>
> " 'A former judgment on the merits estops the parties thereto not only as to every ground of recovery which was actually presented in the action in which it was rendered, but also as to every ground which might have been presented. Thus, where the plaintiff in an action claims the right of property in a certain thing, the only question involved is whether the property in question belongs to him or not, and if the action results in favor of the defendant, it will bar any action against the same party for the same property, although the plaintiff failed to set up all the rights upon which he might have relied to maintain his cause of action. So also the judgment in an action to quiet title is conclusive of the

title, whether adverse to the plaintiff in the action or to the defendant. In other words, it determines the merits of the plaintiff's title as well as that of the defendant.' " Hickey v. Johnson, 9 Fed. (2d) 498 (8 C. C. A.).

"The test of the identity of the causes of action is the identity of the facts essential to maintain them." Hottelet v. Garden City Milling Company, 285 Fed. 693 (8 C. C. A.).

"The allegations, it is true, are general, but they were sufficient had the petitioner so desired, to permit the introduction of testimony, including the record of proceedings before the immigration authorities and to allow his discharge if petitioner were entitled to relief on any of the grounds now urged. . . .

"According to the general principles of the doctrine of of res judicata, a former judgment is a bar not only as to matters actually argued and decided, but also as to all other matters which might have been put in issue, argued and decided." Wong Sun v. Fluckey, 283 Fed. 989 at 991.

"The petitioner had full opportunity to offer proof of it at the hearing on the first petition, and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition if the first failed, was to make an abusive use of the writ of habeas corpus. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time." Wong Doo v. U. S., 265 U. S. 239, 68 L. Ed. 999.

See also:

Fowler v. Osgood, 141 Fed. 20-24, and cases cited.

The foregoing decisions, in our judgment, state the law upon the subject and are in conflict with the conclusions reached in this case by the Circuit Court of Appeals.

The Circuit Court in denying the plea of res judicata rested its decision upon the ground that the claim of the National in its first suit based upon its indemnity agreement "was not a proper subject for litigation in the former suit." The court in the same paragraph goes on to assert that the National "is not concluded by that decree" since its indemnity claim "is a matter which could not properly have been litigated" and that the National is, therefore "not concluded by that decree although it (the indemnity claim) was put in issue by the pleadings."

Why was the National's claim, based upon its indemnity agreement, "not a proper subject for litigation in the former suit," and why was it a matter "which could not properly have been litigated" therein. The same parties were there as here; the Court had jurisdiction not only of them but of the subject matter as well, and had the jurisdictional power and right to hear and decide the cause of action there pleaded, based upon the indemnity agreement.

In the Centropolis Bank case the Surety relied in one action upon both subrogation and indemnity. The Circuit Court in that case did not hold that the indemnity agreement was not a proper subject of litigation but on the contrary recognized it as properly before the Court and granted relief under it.

Courts of equity boast that they never do things by halves, and that having once taken jurisdiction of a controversy they will retain jurisdiction until the entire controversy between the parties has been disposed of. In accordance with this well recognized equitable principle, it has been the common practice in cases of this character for surety companies to assert at the same time and in the same suit not only rights by way of subrogation but rights by way of indemnity as well. That is what was done in Maryland Casualty Co. v. Fouts, supra, in Zimmerman v. Chelsea Savings Bank, supra, and in the case of American Surety Co. v. Barnesville Bank, supra.

Upon what theory can it be held that although the National's indemnity claim "was put in issue by the pleadings" in the first case that nevertheless "such claim was not a proper subject for litigation in the former suit?"

Since the decision complained of concedes that the National's claim, based upon its indemnity agreement, was "put in

issue by the pleadings" in the first case, and since the same evidence was offered there as here, the same relief prayed for there as here, and since that cause of action is identical with the cause of action here sued upon, and since the parties to this suit were parties to the original suit, and since the court in the original suit, as in this suit, had jurisdiction of both the parties and the subject matter, it is submitted that the decree of the District Court in the first case renders that claim res judicata between these parties.

The District Court in holding this matter res judicata, used the following language:

> "It seems to me clear, notwithstanding the theory relied upon by the plaintiff in this action to distinguish it from the former case, that the subject matter of the litigation is the same and that the former case has disposed of the subject matter definitely and that nothing is left to be disposed of in this case otherwise than therein determined.
>
> "In that case the Circuit Court of Appeals affirmed the judgment of this court giving priority of payment to the American Surety Company of the amount due it through Mr. Groesbeck before the plaintiff in this case can be paid anything.
>
> "Now you cannot change the decree by changing the theory of your cause of action. The subject matter of this obligation has been disposed of." . . . (R. 210).
>
> "As already said, by the decree in the former suit no funds are available for the liquidation of the plaintiff's indebtedness until Mr. Groesbeck as treasurer, or his guarantor, the American Surety Company, has been made whole. That judgment must stand." (R. 211).

The National in its appeal to the Circuit Court from the decree in the first case placed precisely this construction upon that decree. In its original brief filed with that Court we find this language:

> "The decree complained of herein operates to defeat the legal rights of this appellant against its prin-

> cipal the said Bank, as well as to work an injustice to the superior equities of this appellant." (R. 146).

In said brief the National also asserted:

> "That the decree of the trial court herein be reversed, and that a decree be entered herein that the *claim* of the National Surety Company *against said Receiver* in the sum of $120,000.00, and the claim of the American Indemnity Company against said Receiver in the sum of $5,000.00 *be allowed and approved, that the Receiver of said National City Bank be directed to pay to each of said appellants dividends on their respective claims.*" (R. 146).

In its petition for re-hearing filed with the Circuit Court in the prior case the National used this language:

> "The court erred in affirming the decree herein holding that the American Surety Company is entitled to be first paid in full from the dividends paid and to be paid by the Receiver of the National City Bank *before these appellants receive anything.*" (R. 202).

It would therefore appear that at the time the National was appealing from the first decree it placed the same construction upon that decree as did the District Judge in his oral opinion quoted above.

Where there are two possible interpretations of a decree, that one will be adopted which makes it harmonize with the facts and law of the case and which renders it the more reasonable, effective and conclusive. (23 Cyc. 1101). Moreover, since the National placed the very construction upon the original decree throughout that case which the District Court placed upon it in the present case, this Court will not without strong reason place upon it a different construction. (23 Cyc. 1101; Mooney v. Mooney, 31 N. Y. Supp. 118).

Respondent in its brief in opposition to the petition for writ of certiorari cited no cases to meet the above authorities, but in its brief in the Circuit Court of Appeals cited numerous cases dealing with res judicata. The citation of those authorities, however, discloses a failure to distinguish between cases

where the cause of action or claim sued upon is identical with the cause of action theretofore adjudicated and cases where a former judgment is urged as an adjudication only of some element in the subsequent case. This fundamental difference in the law of res judicata between "the conclusiveness of a judgment" on some one point or fact even though the causes of action be different, as distinguished from that of "bar by former judgment" where the causes of action are the same, as affecting parties to the original litigation or their privies, is to be constantly borne in mind and differentiates entirely the cases heretofore relied upon by the respondent upon this point.

Even if it should be asserted that the issue with respect to the indemnity claim was not in terms passed upon by the District Court in the first case, if, nevertheless, as admitted in the decision complained of, that claim "was put in issue by the pleadings," it is respectfully submitted that the matter is nevertheless res judicata between these parties under the holding of the Eighth Circuit Court of Appeals in

> Commercial Electric Supply Co. v. Curtis, 288 Fed. 657 (certiorari denied 263 U. S. 709):

> "A final decree or judgment of a court between parties to a suit therein, of whom and concerning the subject-matter of which it (the court) has jurisdiction renders not only every claim and defense which they made and obtained a decision of, but also every claim and defense that they might have made and that the court might have decided in that suit res judicata between them."

Since the indemnity claim "was put in issue by the pleadings" in the first suit, it is submitted that the decree in that case is conclusive "as to every question which was or might have been presented and determined in the former suit" including the claim now relied upon by the National. Moreover, it should not be forgotten that in the first case the District Court specifically found the *issues* in favor of the plaintiff. (R. 108).

CONCLUSION.

This court, upon reviewing the decision complained of, should reverse the same and order an affirmance of the decree of the District Court because:

1. The subject matter of the present suit is res judicata.

2. The decision of the Centropolis case which is adopted herein involves an erroneous application of the doctrine of relation back permitting the National, which was not a creditor at the time of the failure of the bank, to share with those who were depositors and creditors of the Bank at that time and results in an unfair distribution of assets contrary to the provisions of the National Banking Act.

3. The decision permits the National, in violation of its contract, to compete with Groesbeck in the enjoyment of the dividends while its guaranty to him is still outstanding and unperformed. The decision fails to hold the National to its guaranty of Groesbeck's entire deposit and overlooks the proposition that it is the final amount left unpaid by the bank which the National secured. The decision relieves the National from the payment of the full penalty of its bond and the National is thus discharged from its contractual obligation not by performance but by the decree of the court.

Respectfully submitted,

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[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 424

EDWARD E. JENKINS, RECEIVER OF THE NATIONAL CITY BANK OF SALT LAKE CITY, UTAH, ET AL., PETITIONER,

vs.

NATIONAL SURETY COMPANY OF NEW YORK, RESPONDENT.

BRIEF OF JOSEPH W. McINTOSH, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, AS AMICUS CURIÆ, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Comes now Joseph W. McIntosh, Comptroller of the Currency of the United States, who is charged by law with the supervision of receivers of insolvent national banks, and with the disbursement of moneys in the administration of insolvent national banks, and, by

leave of court first had and obtained, respectfully submits his brief, as *amicus curiæ,* in support of the petition for certiorari heretofore filed in the above entitled cause.

Opinions of the Courts Below.

The decree of the United States District Court for the District of Utah in this case will be found at page 51 of the record, and the opinion of the Circuit Court of Appeals of the Eighth Circuit, reversing the decree of the district court, appears at page 232 thereof, and is reported in 18 Fed. (2d). 707.

The decree of the district court in the first case between these same parties, and relating to the same subject-matter, to which frequent reference will be made, appears at page 107 of the record, and the opinion of the Circuit Court of Appeals of the Eighth Circuit affirming that decree appears at page 110 thereof, and is reported in 5 Fed. (2d), 34.

Jurisdiction.

The opinion of the circuit court of appeals in the instant case was entered March 28, 1927, petition for rehearing was filed in due course, and rehearing denied June 14, 1927.

No question of jurisdiction was raised in the courts below.

Jurisdiction by this Court is invoked under Section 240(*a*) of the Judicial Code, as amended by the Act of February 13, 1925 (C. 229; 43 Stat., 936, 938).

Issues.

It will be conducive to a better appreciation of the facts to state, at the outset, the issues involved. They are as follows:

1. Did the court err in holding that the National Surety Company, which had paid a depositor of the National City Bank of Salt Lake City $125,000 as the penalty of its depository bond insuring payment of the entire deposit, was entitled to prove a claim for $120,000 ($5,000 had been assigned to the American Indemnity Company) against the receiver of the bank as a general creditor, with the right of receiving past and future dividends thereon ratably with other creditors, before the depositor so indemnified had received dividend payments from the receiver of the balance of his deposit, the said claim of the Surety Company being based upon a provision in the application of the bank, as principal, to the Surety Company, for said bond; whereby the bank agreed to indemnify the Surety Company from loss on said bond, the depositor not being a party to said application-contract, and the bond containing no provision bearing thereon?

2. Did the court err in holding that the matters in issue were not *res judicata?*

Basis of Petition for Certiorari.

(*a*) The decision of the circuit court of appeals in the instant case is in "conflict with the decision of another circuit court of appeals on the same matter

(Rule 35, par. 5(*b*), Revised Rules of the Supreme Court of the United States. See Beechnut Packing Company *vs.* Lorillard, 273 U. S., 629, granting certiorari on this ground)."

As will more fully hereafter be indicated, the decision in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of Maryland Casualty Company *vs.* Fouts *et al.*, 11 Fed (2d), 71, dealing with a similar question.

(*b*) The circuit court of appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. (Rule 35, par. 5(*b*), Revised Rules of the Supreme Court of the United States.)

The decision involves the administration by the Comptroller of the Currency of the United States of the national banking law, in connection with the winding up of insolvent national banks, and the distribution by him of "ratable" dividends to the creditors of such banks as provided in Sections 5234 and 5236 of the United States Revised Statutes and amendatory acts. The existing conflict of appellate decisions renders uncertain the course the Comptroller should follow in existing and future cases.

Statement of Facts.

The facts, so far as the issues here involved are concerned, are not disputed. As already indicated, the same parties have had two controversies concerning

the subject-matter, and one of the issues now before the court is that of *res judicata.*

First Case.

E. J. Grosebeck, as Treasurer of Salt Lake County, qualified for office by giving bond for $200,000 to the county, with the American Surety Company as surety, conditioned, *inter alia,* upon the safekeeping of the county funds. The statutes of Utah *permitted* deposit of funds in a bank, prescribed the conditions under which such deposit should be made, but even if so deposited, the Treasurer remained primarily responsible to the county. (Construction of the State statute by the circuit court of appeals in the first suit—National Surety Company *vs.* Salt Lake County *et al.,* 5 Fed. (2d), 34, 36.) Grosebeck arranged to deposit in the National City Bank of Salt Lake City. To protect his deposit the bank, as principal, executed three surety bonds running to Grosebeck, one of the National Surety Company for $125,000; one of the Fidelity and Deposit Company of Maryland for $75,000; and one of the Massachusetts Bonding and Insurance Company for $25,000; total $225,000. In addition, the bank pledged with him bonds of the Crystal Lake Farms Company of the par value of $360,000. In its applications for these bonds, the bank agreed to indemnify and save the Companies harmless and free from loss. The bond of the Fidelity and Deposit Company contained a provision, not in the other bonds, giving the Company immediate subrogation for the amount of its penalty. That Company is not involved in this suit.

The Massachusetts Bonding and Insurance Company, although made a party by interpleader in the first action, did not continue to participate in the litigation and is now out of the case. The bond of the National Surety Company was conditioned that the bank

> "well and truly keep all sums of money so deposited or to be deposited * * * and * * * pay over the same * * * and * * * in all respects save and keep the said E. J. Grosebeck, Treasurer, harmless and indemnified for and by reason of the making of said deposit or deposits * * *."

The bank failed January 17, 1922, and Edward E. Jenkins was appointed Receiver, and is still acting as such. At the date of suspension Grosebeck, as Treasurer, had on deposit, $643,094.29. The county was reimbursed in full: by the direct payment of $200,000 by the American Surety Company on its bond of Grosebeck; by the payment on the depository bonds, through Grosebeck, Treasurer, obligee, of $125,000 by the National Surety Company, $75,000 by the Fidelity and Deposit Company, and $25,000 by the Massachusetts Bonding and Insurance Company, total $425,000; and by the payment of $218,094.29, in two dividends, from the receiver of the bank through Grosebeck; total, $643,094.29. In this situation, although the County had been made whole, it will be noted that Grosebeck still had approximately $400,000 due him as a depositor. The second of the foregoing dividends exceeded by $9,143.41 the amount necessary to reimburse the County, and, therefore, left such sum of $9,143.41

available for reimbursement of such Surety Company as might be entitled thereto by subrogation or otherwise. Grosebeck had assigned to the American Surety Company $200,000 of his depositary claim (he had, in his application, agreed to indemnify the Bonding Company and save it harmless) upon the payment by the American Surety Company of the amount called for in its bond to the County. Thereupon, to determine the right to said sum of $9,143.41, and to future dividends, and to said Crystal Lake Farms Company bonds, the American Surety Company and Grosebeck sued the receiver, claiming the right to all dividends until such time as both should be made whole. (Record, 73-77; also see National Surety Company *vs.* Salt Lake County *et al.*, 5 Fed. (2d), 34, summarizing the facts in the first case.)

Upon the answer and prayer of the receiver (Record 80-84), the court required interpleader of the National Surety Company, the Massachusetts Bonding and Insurance Company, and the American Indemnity Company (assignee to the extent of $5,000 of the claim of the National Surety Company). The response of the National Surety Company set forth a claim of prior right to both past and future dividends, based upon: (1) subrogation, as the result of the payment by it of its depository bond, and (2) reimbursement in the amount of $120,000 alleged to be due it from the bank upon the indemnity provisions of the application of the bank for the bond. (Record 91-92.) The National Surety Company thereupon prayed for the allowance of its claim of subrogation (Prayer No. 4, Record 92),

and allowance of its claim of $120,000 as a general creditor, with the right of dividends ratably with other creditors, based upon its indemnity contract (Prayer No. 5, Record 92). The contentions and claims of the National Surety Company thus set forth were put in issue by the reply of the American Surety Company to said contentions and claims. (Record 95-98.)

The case went to trial upon the issues so created and the trial court held that the American Surety Company had priority in the dividends until it should be made whole, and that the National Surety Company should be postponed as to all dividends until the American Surety Company had received payment in full (Record 107). The trial court was affirmed on appeal. (National Surety Company *vs.* Salt Lake County, 5 Fed. (2d), 34, 35.)

Second Case.

Thereafter the National Surety Company filed the instant case against the receiver, setting up the indemnity provisions contained in the application of the bank for said $125,000 bond, and prayed for the allowance of its claim of $120,000 as a general creditor of the bank, with the right to draw dividends ratably with other creditors. A copy of said application was attached to the bill of complaint as an exhibit (Record, 1-11). Upon the answer and prayer of the receiver, Grosebeck and the American Surety Company were interpleaded, issue was joined, and the trial court held that the issues had been adjudicated in the prior suit; that the claim of the National Surety Company should be allowed and approved, but subject to the

prior right of the American Surety Company to receive sufficient dividends to be made whole, as provided in the decree in the former case, and that the allowance of the claim of the National Surety Company should not affect the existing basis of payment of dividends to the general creditors (Record, 51). Upon appeal, the circuit court of appeals held that the issues were not *res judicata*, allowed the claim of the National Surety Company for $120,000, reversed the decree of the trial court, and directed the trial court to enter a decree requiring the receiver to allow the claim of the National Surety Company upon its indemnity contract as a general creditor, and to pay dividends thereon pro rata with other general creditors, *including the dividends theretofore paid to general creditors.* (Record, 232; National Surety Company *vs.* Jenkins, 18 Fed. (2d), 707.)

ARGUMENT.

I.

The court did err in holding that the National Surety Company—which had paid a depositor of the National City Bank of Salt Lake City $125,000 as the penalty of its depository bond insuring payment of the entire deposit—was entitled to prove a claim for $120,000 ($5,000 had been assigned to the American Indemnity Company) against the receiver of the bank as a general creditor (with the right of receiving past and future dividends thereon ratably with other creditors), before the depositor so indemnified had received dividend payments from the

receiver of the balance of his deposit, the said claim of the Surety Company being based upon a provision in the application of the bank, as principal, to the Surety Company, for said bond, whereby the bank agreed to indemnify the Surety Company from loss on said bond, the depositor not being a party to said application-contract, and the bond containing no provision bearing thereon.

The circuit court of appeals held in this connection in the instant case that the National Surety Company was a creditor by reason of the indemnity provisions in the bank's application for bond, and was entitled to prove its claim for $120,000 as a general creditor, and to receive dividends ratably thereon with other creditors, including an amount equivalent to the dividend theretofore declared as to other creditors, and overruled the opposing contentions that the allowance of said claim and the payment of dividends thereon would be the payment of the surety at the expense and loss of the depositor whom it had indemnified, before said depositor had been made whole and, therefore, while the condition of the bond—that the bank should well and truly pay "all" sums of money deposited—was still unperformed and the obligation of the bond therefore still in force.

The court devoted the major portion of its opinion to the discussion of the *res judicata* issue and disposed of the indemnity issue by citing and relying upon the Centropolis Bank case, *infra*, in the eighth circuit.

In United States Fidelity and Guaranty Company *vs.* Centropolis Bank, 17 Fed. (2), 913, the case thus

relied upon, it appears that the Surety Company gave a depository bond of $50,000 with the bank as principal to secure a county deposit. The bank failed and the Surety paid the county and then filed its claim of $50,000 with the State Commissioner of Finance, relying upon an indemnity contract similar to the one in the instant case. The Commissioner rejected the claim and the Surety filed suit to establish its claim and that it be decreed to have the right to share ratably with other general creditors in the distribution of dividends from the bank. The trial court held that the Surety Company was entitled neither to subrogation nor to dividends upon its indemnity claim, inasmuch as the county had not been paid in full from the dividends of the bank. It further held that although the Surety Company was entitled to have its indemnity claim allowed, it should not receive dividends thereon until the county had been paid in full. The circuit court of appeals affirmed the trial court as to its ruling upon the matter of subrogation, but reversed it as to the indemnity claim and held that the Surety was entitled to the allowance of its indemnity claim of $50,000 and to dividends thereon ratably with other creditors.

The primary basis of the court's decision in the Centropolis case was the so-called "relation back" doctrine, whereby a surety, whether by express indemnity agreement, or the indemnity implied by law from his principal, is entitled to a claim against his principal for the amount of loss sustained by him in the performance of his bond, and that upon the execution of the bond by the surety, the relation of debtor

and creditor immediately arises, prior to performance of the bond, and that inasmuch as the relation of debtor and creditor thus arose prior to the insolvency of the bank, the surety was entitled to file its claim with other creditors whose claims originated prior to the insolvency.

Assuming, for discussion only, the existence of the "relation back" rule, it would seem obvious that the rule cannot be permitted to work an injustice by depriving the depositor thus insured of any remedies which he might have against his debtor, nor can it affect the independent contract, represented by the bond, existing between him on the one hand and the bank and the surety on the other. It is no longer open to question, in view of decisions such as Merrill *vs.* National Bank of Jacksonville, 173 U. S., 131, that a creditor is not deprived of his remedies against the debtor by reason of the fact that he may have either collaterals or other security for the payment of the debt, and that such creditor is entitled to receive payment from the debtor, by way of dividends or otherwise, regardless of what he may collect from the surety or collaterals, until the amounts received by him from the debtor and from the collaterals or surety have made him whole. The creditors in the instant case, Grosebeck and his assignee, the American Surety Company, are entitled to receive dividends from the assets of the bank without diminution thereof by way of payments to the surety to reimburse him for the very indebtedness which he contracted to assume, as such course would take from the depositor part of the assets upon which he had a right to rely for collection. To

hold, on the one hand, that the surety is not entitled to subrogation where the creditor has not been paid in full, even though the surety may have paid the full penalty of his bond, on the theory that it would be inequitable to permit the surety to compete with his obligee, and take from the obligee, to the latter's prejudice, securities or rights in which the obligee is still interested, and on the other hand, to permit that same surety in that same transaction, to receive dividends upon an indemnity claim growing out of the very indebtedness which he indemnified, is, in actual effect, subrogation, although in a lesser degree, for the reason that it takes from the obligee a proportionate share of dividends which he would otherwise receive. The assets of the estate would open up in such case, to permit the participation of the surety, at the expense of the obligee.

A further consequence of allowing such indemnity claim, and dividends thereon, is the virtual abrogation, *pro tanto*, of the depository bond-contract between the surety and the bank on the one hand, and the depositor on the other hand, by subjecting such contract to the terms of the express or implied indemnity contract existing only between the bank and the surety, without the consent of the depositor-obligee or his participation in said indemnity contract. The bond-contract was that the bank would repay all deposits and the surety guaranteed that such would be done, and under the equitable doctrines governing subrogation, the surety cannot participate by subrogation until his obligee has been paid in full. Such principle becomes part of the bond-contract by operation of law. The

effect of the indemnity contract, if allowed, would be to require the bank, not to repay all of the deposit before the surety should obtain anything by way of reimbursement, but that the bank should repay the deposit subject to the right in the surety company to receive part of that deposit by way of dividends, before the depositor shall have been paid in full. It is not reasonable to hold that the depositor's contractual rights can be thus changed without his consent. It is to be noted, in this connection, that such participation by the bonding company *could* have been arranged, and the same *was* done in this very case by the Fidelity and Deposit Company, where the express terms of the bond given by it provided that it should have immediate subrogation; but a provision in a bond, accepted by the depositor is one thing, and the application for a bond containing indemnity provisions, with which the depositor has no concern whatsoever, is an entirely different thing.

It is thus believed that in reason and upon principle, the Centropolis decision is erroneous. That court seems to cite no cases in support of its decision with reference to the indemnity agreement, except upon the general principle of "relation back," although it did recite that the surety company in the presentation of its argument relied upon certain cases, the principal ones of which were U. S. Fidelity and Guaranty Co. *vs.* Carnegie Trust Company, 164 N. Y. Sup., 92; 221 New York, 646; 117 Northeastern, 1086, and American Surety Company of New York *vs.* National Bank of Barnesville, 17 Fed. (2), 942. The court did not

discuss these cases. Brief comment upon them here is helpful.

In the case of U. S. Fidelity and Guaranty Company *vs.* Carnegie Trust Company, *supra*, the surety was allowed its indemnity claim with the right of dividends thereon, on the theory that the indemnity contract created a debtor and creditor relation, but the court cited no cases in support of its position. The question of whether or not dividends could be paid thereon to the detriment of the other creditors does not seem to have been passed upon, however, the court stating in that connection:

> "It is not necessary to determine whether or not the claim of the plaintiff can be allowed in such a way as to diminish the dividends which would otherwise accrue to the bankruptcy creditors. It is contended that such effect cannot be given, because it would violate the spirit of the guaranty. The Special Term has so held, and has made full provision for the protection of the bankruptcy creditors in the judgment appealed from, and from this judgment the plaintiff has taken no appeal."

In the case of American Surety Company *vs.* National Bank of Barnesville, *supra*, in the District Court for the Southern District of Ohio, the court specifically denied the surety the right of subrogation, the depositor not having been paid in full, and in the face of its reasoning sustaining its position in that respect, allowed the surety company an indemnity claim for the amount of penalty paid by it under its bond, based

upon indemnity provisions in the application, and directed that the receiver deduct the amount of said indemnity claim from the claim of the depositor and recover from the depositor the dividends paid by it upon said $6,000. The court thus denied the claim of subrogation and immediately gave subrogation for the full amount, in the manner indicated. It seems apparent that the case is not entitled to weight as an authority.

> Maryland Casualty Company *vs.* Fouts, 11 Fed. (2), 71.

This case, from the Circuit Court of Appeals, Fourth Circuit, holds contrary to the Centropolis case and denies the right of a surety either by subrogation or by way of indemnity, to participate in the assets of the bank until the depositor is paid in full.

The Surety Company gave the Treasurer of the State of North Carolina a depository bond of $50,000, with the Peoples National Bank of Salisbury, as principal. The application of the bank for the bond also contained indemnity provisions. The bank failed, the surety company paid its $50,000 under the bond, and the depositor remained unpaid in full. The surety claimed: (1) the right to a claim of $50,000 under its indemnity agreement, and (2) right of subrogation by reason of payment of $50,000. The district court held:

> (72) "That the plaintiff, Maryland Casualty Company, is not entitled to receive any dividends from the defendant, J. E. Fouts, receiver of the People's National Bank of Salisbury, until intervener, B. R. Lacy, Treasurer of the

State of North Carolina, has received his entire deposit, and that the said plaintiff, Maryland Casualty Company, after payment has been made to the said B. R. Lacy, Treasurer of the State of North Carolina, of the full amount of his deposit, with interest, is entitled to be subrogated to the rights of said State treasurer to, and to receive from the said J. E. Fouts, receiver, such additional dividends as may be declared by him upon the sum of $50,000, penalty of the bond executed by the Maryland Casualty Company and the amount paid by it thereon to the State treasurer. * * *"

"* * * *That the plaintiff is not entitled to recover of the defendant, J. E. Fouts, receiver of the People's National Bank of Salisbury, on its indemnity agreement with the said bank*, and that the said Maryland Casualty Company is only entitled to subrogation to the rights of B. R. Lacy, Treasurer of the State of North Carolina, as hereinbefore set forth." (Italics inserted).

In disposing of the issue, the circuit court of appeals said:

(p. 72) "The determination of appellant's rights and liabilities depend upon the effect and meaning of the undertaking given by it to indemnify the State on account of its money deposited in the bank, and the agreement of the bank with the appellant surety company to indemnify it on account of the indemnity bond.

"The right of subrogation for the amount paid by appellant to the State depends upon whether the sum paid was in full of the liability

on the indemnity bond, or only on account thereof. If appellant was not lawfully entitled, out of the general assets of the defaulting bank, to be substituted to the rights of the State, whose indebtedness it paid, under its indemnity bond, to the extent of $50,000, then no right of subrogation existed in its behalf. To allow the appellant to assert such indebtedness, based upon its alleged claim as a creditor for the amount paid by it under its bond of indemnity to the State, and claimed to be in full of such liability, would be to permit the assertion of a claim in behalf of a guarantor against those it undertook to indemnify, in advance of the latter being paid in full the amount due them.

"The penalty of the bond in this case, it is true, was $50,000, and, subsequent to the bank's failure, the amount of the penalty was paid by the surety; but the whole obligation to the State was by no means extinguished. On the contrary, there remained a balance of $39,579.14 due. The condition of the indemnity bond was to pay upon demand *all* money deposited in said bank, no limitation in amount being placed thereon, as set forth in full in the provision of the bond hereinbefore given. Manifestly, the surety therein could not assert a claim, either by way of subrogation or *otherwise*, on account of what it saw fit to pay on its bond indemnity, as an admitted liability, leaving *unpaid* such portions thereof as it saw fit not to settle."

(p. 74) "* * * Appellant's position is purely contractual, and until it has met its liability, and the State has been paid in full, as well for the excess deposits of $39,579.14, as for the penal amount of the indemnity bond, it has no right, by subrogation or otherwise, in a case

> like the present one, to call upon others to share its burdens."

Some parts of the discussion by the court may at first seem to suggest that the court was considering only the subrogation aspect of the case, but the court denied relief either by way of subrogation "or otherwise," and the above quoted extracts clearly indicate that both questions were before it and were disposed of, and in closing the court said:

> "The decree of the district court is plainly right and should be affirmed with costs."

This phase of the question, from the standpoint of indemnity right as distinguished from subrogation, does not seem to have been passed upon by the courts, either State or Federal, other than above indicated, with the exception of one case in the Supreme Court of Michigan. In Commissioner of Banking *vs.* Chelsea Savings Bank, 161 Mich., 691; 125 Northwestern, 424, the surety contended that the agreement of indemnity given to it by the bank entitled it "to stand as a creditor of the bank and receive its share of any dividends paid." In denying this claim, the court said:

> "Its undertaking is that its principal shall repay all moneys deposited, and it must be construed as a security for the whole debt. It is conceded, and the authorities cited by counsel for the intervener, sustain the concession and the general rule, that in such a case the guarantor is not entitled to a share of the dividends which are declared and paid in reduction of the whole debt."

Also see the cases of Springfield National Bank *et al. vs.* American Surety Company, 7 Fed. (2d), 44, and Fidelity and Deposit Company of Maryland *vs.* Robinson, 7 Fed. (2d), 371, denying the right of a surety to set off a claim under its indemnity contract in connection with a depository bond, against its liability to the receiver of the bank upon a fidelity-employees bond given to the bank before its suspension; and the case of U. S. Fidelity and Guaranty Company *vs.* Wooldridge, 268 U. S., 234, upon which such cases are based.

Without going further with the discussion in this connection, it is evident that a direct conflict exists between the Circuit Courts of Appeals of the Fourth and Eighth Circuits on this important question, and it is imperative that this Honorable Court determine for the guidance of the Comptroller of the Currency the lawful course to pursue in such cases.

II.

The Court Erred in Holding That the Matters in Issue Were Not Res Judicata.

In the response of the National Surety Company to the interpleader in the first case (Record, p. 87), the Surety Company based its claim both upon subrogation and upon its indemnity contract, and, as already indicated, in Prayer No. 4, asked for subrogation, and in Prayer No. 5 asked for the allowance of its claim upon the indemnity contract (Record, pp. 91-92). The answer of the American Surety Company to the claims of the National Surety Company (Record, pp. 95-98),

denied the contentions of the National Surety Company and placed them in issue. That the indemnity agreement was thus put in issue in the trial court is recognized by the circuit court in the instant case (National Surety Company *vs.* Jenkins, 18 Fed. (2nd), 707, 710), but the circuit court of appeals in the instant case took the position that the indemnity agreement was not a proper basis of claim to be put forward in connection with the subrogation agreement, and that it was not actually litigated and

> "was not necessarily determined by the decree in the former suit * * * although it was put in issue by the pleadings" (p. 710).

The National Surety Company, however, evidently considered, in the first case, that the indemnity contract was still in issue and in litigation, inasmuch as its eighth assignment of error (Record, pp. 136, 137, 138), shows strenuous contention in that respect, as follows:

> "* * * and for the further reason that the undisputed evidence shows said National Surety Company has a valid claim for reimbursement from the receiver of said bank as provided for in said application made by said bank for said bond, in which application said National City Bank promised to indemnify and hold said National Surety Company harmless from any loss on account of its execution of said bond for said bank, and that if said American Surety Company has any such right or claim upon the assets or funds in the hands of said receiver, it is subsequent and inferior to the

> rights of this defendant, National Surety Company * * * and that the *legal* right of the National Surety Company to reimbursement from said bank and the receiver thereof, by reason of said application executed by said bank and to the *equitable* right of direct subrogation against the said bank and its receiver, as the principal upon said bonds is superior to any alleged right of said American Surety Company against said bank or its receiver and the funds in his hands as such receiver." (Italics inserted.)

The trial court, in the first case, as already indicated, denied relief upon either ground, and the circuit court of appeals, in that case (National Surety Company *vs.* Salt Lake County, 5 Fed. (2nd), 34, 35), in stating the issue which was before the trial court and the disposition of the same by the trial court, said as follows:

> "The single question is whether, upon the facts stated, the law and the equities give these remaining dividends and proceeds of the Crystal Lake Farms bonds, after the county has been paid in full, to the appellant, National Surety Company, or to the appellee, American Surety Company. The learned trial court held that the American Surety Company is entitled to all funds derived and to be derived from such dividends and bonds, till it shall have been paid the sum of $223, 362.15, the total sum paid by it on its fidelity bond, including interest, and with interest on the basic sum, at the rate of 8 per cent, from February 29, 1924, and that the appellant, National Surety Company, shall be postponed in participation in such funds till the

appellee, American Surety Company, shall have been paid in full."

This matter was clearly summarized by the district court in the instant case in the following language:

> "It seems to me clear, notwithstanding the theory relied upon by the plaintiff in this action to distinguish it from the former case, that the subject matter of the litigation is the same and that the former case has disposed of the subject matter definitely and that nothing is left to be disposed of in this case otherwise than therein determined.
>
> "In that case the circuit court of appeals affirmed the judgment of this court giving priority of payment to the American Surety Company of the amount due it through Mr. Grosebeck, before the plaintiff in this case can be paid anything.
>
> "Now you cannot change that decree by changing the theory of your cause of action. The subject matter of this obligation has been disposed of." * * * (R., 210.)
>
> "As already said, by the decree in the former suit, no funds are available for the liquidation of the plaintiff's indebtedness until Mr. Grosebeck, as treasurer, or his guarantor, the American Surety Company, has been made whole. That judgment must stand." (R., 211).

It would thus seem that inasmuch as the parties were the same in both cases, and the indemnity contract was a basis of claim in both cases, the adjudication in the former case, denying right of recovery, was binding and could not be relitigated in the instant case.

As said in Commercial Electric Supply Co. *vs.* Curtis, 288 Fed., 657, 660 (certiorari denied, 363 U. S., 709):

> "A final decree or judgment of a court between parties to a suit therein, of whom and concerning the subject matter of which it (the court) has jurisdiction, renders not only every claim and defense which they made and obtained a decision of, but also every claim and defense that they might have made and that the court might have decided in that suit, *res adjudicata* between them" (p. 660).

In Wong Sun *vs.* Fluckey, 283 Fed., 989, 991, the court said:

> "According to the general principles of the doctrine of *res adjudicata*, a former judgment is a bar not only as to matters *actually* argued and *decided*, but also as to all other matters which *might have been* put in issue, argued and *decided*." (Italics inserted.)

Conclusion.

It is respectfully submitted that the decision of the lower court in the instant case was erroneous and the petition for writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 424

EDWARD E. JENKINS,

Receiver of The National City Bank of Salt Lake City, Utah, et al.,

Petitioners.

vs.

NATIONAL SURETY COMPANY OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

PREFACE.

The sole question upon which the jurisdiction of the District Court of the United States in and for the District of Utah was invoked, was diversity of citizenship. No federal question was involved in the controversy. The decree of the Circuit Court of Appeals of the Eighth Circuit is therefore final, and petitioners, as a matter of right, can have no standing in this Court. The only avenue of approach to this Court is by an appeal to its discretion by the

writ applied for. This Court has many times declared that this power "will be sparingly exercised", (Lau Ou Beu, 35 L. Ed. 868, 141 U. S. 583), "only in cases of peculiar gravity and general importance", (American Const. Company v. Jacksonville R. Company, 37 L. Ed. 484, 148 U. S. 372), "in some matter affecting the nation in its internal or external relations," (Forsyth v. Hammond, 41 L. Ed. 1095, 166 U. S. 506). An examination of the cases cited by petitioners will disclose that "there is no real and embarrassing conflict of authority between the Circuit Courts of Appeal." (Layne and Bowler, Corp. v. Western Well Works, 67 L. Ed. 712, 261 U. S. 387).

The case at bar involves no question of jurisdiction, nor is it an "extraordinary case," or "a grave question of vital importance to the public;" but is merely a case of importance to the litigants here involved. It is "not such a case as falls within the category of questions of such gravity and general importance as to require its review" by this Court. (Ex-parte Woods, 36 L. Ed. 125, 143 U. S. 215), and the grounds alleged are insufficient to call for the interposition of this Honorable Court. As was stated by this Court in the case of Magnum Import Company v. D. E. Spoturno, (67 L. Ed. 922, 260 U. S. 159), "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

Petitioners in their application set forth twelve grounds alleged to justify the issuance of the writ. Many of these grounds, however, are merely re-statements of other grounds asserted. However, petitioners have set forth practically every ground ever assigned by this Court for the issuance of such writ, even to the extent of contending that the decision "involves a ruling upon important questions of general law that is untenable and contrary to the great weight of authority." The brief is largely an extensive reargument of all phases of the case presented to the Circuit Court of Appeals. Because of the numerous and varied grounds asserted for the issuance of the writ, involving consideration of questions of fact, of local statutes, and the failure of petitioners to distinguish between subrogation and reimbursement and the authorities and principles applicable to each, and because petitioners, in their application and brief rely upon their own conclusions rather than upon facts, the work of respondent in replying thereto, and the length of this reply brief have been multiplied to an extent altogether unjustified, except for the reasons assigned.

II.

STATEMENT OF THE CASE.

Briefly, the complaint herein alleges, and it is admitted by all the parties herein, that on the third day of January, 1921, the respondent National Surety Company, upon the request and application of the National City Bank, executed and delivered to Edward J. Groesbeck as county treasurer of Salt Lake County, its certain bond in the sum of $125,000.000, guaranteeing the repayment of such sums as said treasurer might deposit in said bank, up to the amount of $125,000.00; that as an inducement and consideration for the execution of said bond, the Bank made, executed and delivered to the respondent a certain Indemnity Agreement set forth in said complaint, wherein and whereby it agreed to indemnify the respondent and save it harmless from all claims and demands whatsoever on account of its execution of the said bond, and to pay over, reimburse and make good to the respondent all sums of money which it might be obliged to pay by reason of having executed said bond; and in said Indemnity Agreement the respondent was given the right to look to and rely upon the property of the bank and its income and earnings, and to follow and recover out of the bank's property then belonging to it or which might thereafter belong to it and the income and earnings thereof, for anything that might become due to the respondent under said Indemnity Agreement. Respondent further alleges that on the 17th day of January, 1922, the said National City Bank failed and this respondent was obliged to and did on June 17, 1922, pay to Salt Lake County and Edward J. Groesbeck, its treasurer, the sum of $125,000.00, and that by reason thereof the receiver is indebted to the said respondent in the sum of $120,000.00 ($5,000.00 of its claim having been assigned to the American Indemnity Company). Said complaint concludes with a prayer that its claim based upon said written Indemnity Agreement and filed with defendant receiver of said bank, in said amount, be allowed and approved and that dividends be paid to it upon the same basis as paid to other claimants in the list of common claims against said bank. (R. 1-6).

A true copy of said Indemnity Agreement referred to in said complaint is attached to and made a part of plaintiff's complaint, (R. 6-11), as is also the said bond executed by the plaintiff in behalf of said National City Bank (R. 12),

and the said claim filed with the said Receiver based upon said Indemnity Agreement (R. 13-17).

All of the foregoing allegations of the respondent's complaint were either admitted in the respective answers of the petitioners or upon the trial of the case, and therefore are not in dispute.

While the record herein is voluminous, the testimony offered by the respondent National Surety Company in support of its complaint, (R. 1-17), is very short, and appears at Pages 56-66 of the record. Respondent alleged in its complaint that the said bond was given *pursuant to Section 4500* of the Comp. Laws of Utah, 1917, and that the Treasurer deposited the funds in the bank as such (R.2), and also that the respondent, on June 17, 1922, paid the penalty of its bond in the sum of $125,000.00, and that it has not been repaid any part thereof. (R. 65). The foregoing made a prima facie case for the respondent, and most of the remainder of the record herein is devoted to the efforts of the petitioners to show that the cause of action herein sued upon was res judicata. In support of this contention, petitioners introduced in evidence the pleadings and decree in the other case, and extracts from the record and briefs in that case. The respondent in turn offered extracts from the record and briefs of the petitioners in said action.

Section 1492 of the Comp. Laws of Utah, 1917, provides that the County Treasurer must safely keep all money belonging to the state, or any city or county of the state, until disbursed according to law; that he shall not lend the same; and that he shall be liable therefor on his official bond. The treasurer is expressly forbidden by law to pay out any portion thereof for any purpose, unless authorized by law. The deposit was in the name of the county and in order to draw against it the treasurer was obliged by law and by the bank as well, to have the counter-signature of the County Auditor. (R. 157).

The deposit of said public funds in said bank by said treasurer was made pursuant to Section 4500 of the Compiled Laws of Utah, 1917, which reads as follows:

> "Any public officer having public funds in his custody may deposit the same, or any part thereof, with any bank incorporated under the national banking act and doing business in this state, or with any bank or trust company incorporated under the laws

> of and engaged in business in this state; *provided*, that he requires such depository to pay interest on all funds so deposited at the rate of not less than 2 per cent per annum, and that he take from such depository collateral security or a good and sufficient surety company bond or a personal bond approved by him and sufficient in amount to fully protect such funds. * * * "

Although a consideration of the instant case, of necessity, involves a consideration of the state laws under which the deposit was made, such laws are not mentioned or referred to in petitioners' application or brief. Pursuant to said Section 4500 the respondent, in consideration of the Indemnity Agreement herein sued upon, executed and delivered to Groesbeck as county treasurer, its bond in the sum of $125,000.00, (R. 56-65), and the bank also gave as security for the deposit, the bond of the Fidelity & Deposit Company in the sum of $75,000.00, the bond of the Massachusetts Company in the sum of $25,000.00, and collateral consisting of $360,000.00, par value of bonds of the Crystal Lake Farms Company.

Early in the receivership and prior to any litigation, respondent filed its claim with the receiver, claiming the equitable right of subrogation or substitution, to the dividends to be paid by the receiver upon said deposit, (R. 104). Respondent's claim of subrogation to the dividends to be paid upon the public deposit was denied in said case, and said decree was affirmed by the Circuit Court of Appeals, (National Surety Company vs. Salt Lake County, 5 Fed. [2d] 34), (R. 110). Thereafter, this respondent did not as stated by petitioners, refile the same claim relied upon and made to the bank for its claim to subrogation, but filed with the receiver an entirely new and different claim based upon its own rights under its Indemnity Agreement, and its right to reimbursement. This claim was the foundation of the present suit. (R. 162).

Thereafter, respondent National Surety Company brought the present action as plaintiff, directly against the receiver, upon the contract of indemnity executed by the bank. (R. 1-11). At the request of the receiver, the American and Groesbeck were interpleaded as parties defendant. (R. 29). The defendants pleaded res judicata by reason of the decree in the other action. The trial Court allowed the claim of the National herein sued upon, but decreed that it should receive no dividends thereon. (R. 51).

The respondent National Surety Company appealed from said decree to the Circuit Court of Appeals of the Eighth Circuit, and the same was reversed on March 28, 1927, by a unanimous decision of that Court. (18 Fed. [2d] 707. R. 232). Thereafter, on May 27, 1927, the petitioners herein filed a lengthy and extensive brief for a rehearing, which rehearing was denied by that Court on June 14, 1927. The facts and the situation of the parties in the other action are fully set forth in the opinion of the Circuit Court of Appeals herein and will be further referred to in our discussion of the question of res judicata.

III.

THE QUESTION IN THE COURT BELOW.

The essential questions for determination by the Court were: first, whether the present action is res judicata by reason of the decision of the same Court (Eighth Circuit Court of Appeals) in the case hereinbefore referred to of National Surety Company vs. Salt Lake County, 5 Fed. (2d) 34; and second, the enforcibility of a contract of indemnity. The Court determined that its decision in the action above referred to was not res judicata of the issue here involved, and that, therefore, respondent was a creditor of the bank by reason of its Indemnity Agreement and was entitled to the allowance of its claim against the bank as a separate and independent matter apart from subrogation, and to the payment of dividends thereon. The Trial Court held that respondent was such a creditor and allowed its claim against the receiver, and the Circuit Court of Appeals held that as such a creditor it was upon the same basis as all other creditors of the bank and entitled to the payment of dividends upon its claim pro rata with other creditors. Petitioners cited to the Circuit Court of Appeals, as they have here, cases involving the doctrine of subrogation, to the effect that subrogation will not be permitted in favor of a surety until the obligee has been paid in full, and such cases were properly held by that Court to have no application to the instant case.

Petitioner American Surety Company stated in its brief in the Circuit Court of Appeals, "No one questions the sufficiency of the consideration for the Indemnity Agreement from the bank to the National, or that the obligation of the bank to indemnify the surety springs up at the time the relation is entered into and is consummated when the surety

has paid the debt." Petitioners now contend at Page 65 of their brief herein, "Only by the erroneous application of the doctrine of relation back could the Court reach its conclusion in the Centropolis Bank case. * * * The National was not a creditor of the bank at the date of the declaration of insolvency."

IV.

RES JUDICATA.

Petitioners contend herein that the Circuit Court of Appeals erred in holding that the case of American Surety Company, et al. v. Jenkins, Receiver, 5 Fed. (2d) 34, (R—110), was not res judicata of the question here involved. In order to determine whether said action was res judicata as to the claim of the respondent asserted in the present suit for reimbursement from the assets in the hands of the defendant Receiver belonging to the said bank, it was necessary for the Circuit Court of Appeals to examine and determine said question from the pleadings, the facts, the theory upon which said case was tried, the decree, and the proceedings and record on appeal therein.

Said action was brought for the purpose of recovering a dividend of ten per cent upon the amount of said deposit, to-wit, $56,809.42, of which amount it was alleged by said plaintiffs, $47,666.01 was necessary to be paid to Salt Lake County to make it whole on account of the deposit of public moneys in said National City Bank. Salt Lake County was therefore interested only in that portion of the said dividend. *The said dividend then in the Receiver's hands and the dividends to be thereafter paid by him upon the said deposit of public moneys was the subject matter of said action, to which further dividends accruing in the hands of said receiver upon said deposit, the American Surety Company claimed in said complaint to be entitled, by reason of subrogation to the rights of Salt Lake County and Treasurer Groesbeck.* Said complaint concludes with a prayer that $47,666.01 of said dividend then in the hands of the receiver be paid to Salt Lake County, and that the balance of said dividend and "all further dividends accruing in the hands of the defendant by reason of the deposit of County funds in said bank, be paid over to said American Surety Company of New York." (R—77).

It is therefore apparent that the subject matter of said action was the *special fund* arising from dividends accrued

and and to accrue upon *said deposit*, and from the sale or other disposition of the bonds of the Crystal Lake Farms Company.

The receiver, in his answer to the complaint in said action, alleged that the respondent herein claimed the right to be *subrogated* to the rights of the county and said treasurer in and to said dividends upon said deposit to the amount of its loss in the sum of $125,000.00, and that it had filed its claim to subrogation in said amount, (R—83), and the receiver concluded his answer with a prayer that the Court make its order requiring the respondent herein to appear in said action and *set forth its rights to said dividend then on hand and to such further dividends as might accrue in his hands upon said deposit.* (R—85).

Pursuant to said order of interpleader, the respondent herein filed in said action its answer, claiming subrogation to said dividend together with dividends to be thereafter declared by said receiver upon said deposit, alleging that its right of subrogation to dividends upon said deposit was prior in time and right to that of the American Surety Company, because of the failure of the principal of the latter, to-wit, Treasurer Groesbeck, to comply with the law by not taking from said bank sufficient depository protection to fully protect the public funds so deposited by him. As the Circuit Court held, "The order of Interpleader brought the National in *solely* for the purpose of determining whether it or the American had the prior right of *subrogation* to those specific funds and bonds." (R. 236).

The Petitioners in the present action claimed that Respondent was estopped from bringing this action upon said Indemnity Agreement, notwithstanding the fact, as clearly appears from the record in said action, that *no issue was joined or tried between this respondent and said defendant receiver upon the rights of respondent to have its claim against the said receiver arising out of said Indemnity Agreement, for reimbursement out of the general assets of said bank, allowed and approved, and the receiver directed to pay dividends thereon, as a separate claim and demand.* No claim was made or asserted at the trial of said action by the Respondent for a *separate judgment* against said receiver arising out of said Indemnity Agreement, and the action at the outset resolved itself into a contest between the respective surety companies as to their *respective rights to priority in and to said dividends upon said deposit. The*

receiver filed no reply whatsoever to the said answer of the respondent in said action.

The facts and issues in said action appear fully in the decree of the United States Circuit Court of Appeals in said action, (R—110), and for the sake of brevity, we will merely call attention to that decree in order that the Court may see the facts and issues involved in said case.

All of the parties agreed at the outset of said trial in said other action that Salt Lake County should be paid out of said dividend of $56,809.42 the sum of $47,666.01. Judge Armstrong, representing the county, stated to the Court that it was his understanding that inasmuch as it was agreed by all parties that the county should be first made whole, "that the case will then resolve itself into a contest between the surety companies that are interested here." (R—68).

Salt Lake County was thereupon, in effect, dismissed from the proceeding. (R—70).

The Court thereupon asked the question:

> "What is the fund that the receiver has; how much is left?"

To which Mr. Ray, representing the receiver, replied:

> "$9,143.00." (R—173).

Mr. Jensen, attorney for the American Surety Company, then stated to the Court that the question before it was "the question of the right between the surety companies to the balance of any dividends which may be paid, so we desire all of the surety companies to have an adjudication of their rights with respect *to that fund.*" (R—173).

Mr. Jensen then further stated to the Court:

> "This litigation as it now stands is purely litigation between the official bondsmen, the American Surety Company on the one side and the Massachusetts Bonding Company and the National Surety Company on the other side." (R—174).

Thereupon the Court stated:

> "It is a contest between these bond companies as to priority?"

To this Mr. Jensen replied: "That is the case, your Honor." (R—174).

Said action was thereupon tried and argued to the Court pursuant to the statements made by the respective parties and by the Court, that the action was purely a contest between the surety companies as to their respective rights to *priority to subrogation in the payment of dividends by said receiver upon said deposit*. The Court in said action, and all the parties to said action, recognized the fact that the said action was in fact one concerning only the disposition of the dividends in the receiver's hands and dividends thereafter to accrue in his hands on said deposit, and no claim of any kind whatsoever was made or asserted by this Respondent at said trial against said defendant receiver upon said Indemnity Agreement herein sued upon. However, as bearing upon the equitable rights of the parties and in support of the principle contended for by this Respondent, that a legal title added to an equitable title will prevail over a purely equitable title, it offered in evidence said Indemnity Agreement, as a collateral and incidental matter bearing upon its equitable right to subrogation to said dividends. As a matter of fact, the attorney for the American Surety Company and Treasurer Groesbeck, objected to the receipt in evidence of said Indemnity Agreement upon the theory that it was immaterial and irrelevant to the issues in said case, (R. 117), and we admit that such objection would have been well taken had said Indemnity Agreement been offered for the purpose of establishing a separate and independent claim directly against the receiver for reimbursement out of the general assets of the bank instead of being offered as it was, as collaterally and incidentally bearing upon respondent's right to subrogation. As the Circuit Court of Appeals held herein, "While the Indemnity Agreement of the National Company was pleaded and introduced in evidence, it was upon the theory that it gave a superior equity to the National Company, and because thereof, a prior right to subrogation." (R. 236).

At the conclusion of the evidence, *the sole issue* involved in said case, to-wit, the respective rights of the surety companies to priority to subrogation to said dividends upon said deposit and said Crystal Lake Farm Company bonds, was argued by respective counsel for the Surety Companies, and the cause was thereupon submitted to the Court upon said issue. As the Circuit Court of Appeals held herein, "That was the sole issue tried by the Court and determined and adjudicated by its decree." (R. 235).

The trial Court, at the conclusion of the case, made and entered its order therein for a decree in favor of the American Surety Company to the effect that it was entitled to priority to subrogation in and to the special fund arising from the dividends then in the hands of the said receiver and thereafter to accrue in his hands, and from the sale or other disposition of the Crystal Lake Farm Company bonds.

Said decree, in paragraph C thereof, (R—108), provides as follows:

> "The plaintiff American Surety Company of New York be and it is *subrogated* to and entitled to succeed to the rights of the said Edward J. Groesbeck as treasurer of Salt Lake County and of Salt Lake County, *to all dividends* that may become *payable on the claim in the sum of $568,094.29* of said Edward J. Groesbeck as treasurer of Salt Lake County against said National City Bank, and is subrogated to and entitled to succeed to the rights of said Edward J. Groesbeck as treasurer of Salt Lake County and of Salt Lake County, in the bonds of the Crystal Lake Lands Company of the par value of $360,000.00."

It is apparent from an examination of said decree that the only matter determined or decided in said case was the respective claims of the surety companies to priority to subrogation in and to the fund arising from the said dividends and the sale or other disposition of the said bonds of the Crystal Lake Farm Lands Company of the par value of $360,000.00. Nothing whatever in said decree refers to Petitioners' right to indemnity directly against the bank, and consideration thereof was expressly excluded by reason of the oral stipulations of the parties, hereinbefore referred to upon the trial of said action. The subject matter of said action was the dividends upon the said deposit and the Crystal Lake bonds, and the question therein determined, was the right of the respective surety companies to succeed thereto by subrogation.

It is equally clear from an examination of the opinion of the United States Circuit Court of Appeals affirming said decree of the trial Court, that the *only question in issue, involved or determined in said action was the respective rights of the surety companies to priority by subrogation to the funds to be created from said dividends upon said deposit and the sale or other disposition of said Crystal Lake Farm Company bonds.* (R. 112).

The Circuit Court of Appeals, in its opinion in said action, 5 Fed. (2d) 34, (R. 110), clearly defined the issue involved therein as follows:

> "These cases involve the question of appellants' right *to share by way of subrogation* in certain dividends in the hands of one Jenkins and accruing from assets which came into the hands of Jenkins as Receiver of the National City Bank of Salt Lake City, Utah, which failed on the 17th day of January, 1922, as also the right of appellants *to participate in the proceeds of certain securities* in the hands of one Groesbeck.
>
> "The single question is, whether, upon the facts stated, the law and the equities give these remaining dividends and the proceeds of the Crystal Lake Farm bonds, after the County has been paid in full, to the appellant National Surety Company or the appellee American Surety Company. * * *
>
> "The rule applicable to this situation seems to be fairly well settled. The rule is that 'the right of *Subrogation* cannot be enforced until the whole debt is paid.' * * *
>
> "The rule deducible from the cases is that till the creditor is paid in full, no right of subrogation exists in favor of sureties who pay a part of the debt."

The National designated and offered in evidence certain portions of the brief of the American on appeal to the Circuit Court of Appeals in said case, (R—191-195). Space will not permit us to repeat here the portions of the said brief referred to, but we most respectfully call the same to the attention of the Court.

We desire to call attention specifically to the following extracts from this brief of the American Surety Company, as appearing in the record at the pages referred to:

> "The National Surety Company now claims right of subrogation as to future dividends on E. J. Groesbeck's deposit and as to the Crystal Lake bonds, prior to the American Surety Company of New York." (R—191).
>
> "The primary questions in this case are, therefore, First. Now that Salt Lake County has been

paid in full, which Surety Company is entitled to priority as to dividends from the receiver, on E. J. Groesbeck's unpaid deposit, as County Treasurer, with the bank? Second. What are the rights of the two Surety Companies with respect to the $360,000.-00 par value Crystal Lake bonds taken by E. J. Groesbeck as aforesaid and subsequently assigned to The American Surety Company of New York?" (R. 191).

"Appellants' counsel reminds us that as an additional contractual fact the National Surety Company had an *agreement for indemnity* with the National City Bank (Appellants' Brief 18 to 23 and Tr. 87). *We deem this agreement wholly immaterial to the issues of this case, but we refer to it here to get before the court all the alleged contractual relationships of the parties.*" (R—192).

"As we understand them, the contentions of the National Surety Company are substantially as follows:

"That the indemnity agreement of the bank, embodied in the bank's application to the National Surety Company for depository bond, gives the national Surety Company a direct legal right, not to indemnity out of the general assets of the bank as such, but to indemnity out of the dividends declared and payable upon the claim of Mr. Groesbeck. * * * "

"*It is very clear from the foregoing case, and clear upon principle, that the indemnity agreement between the Bank and the National must be treated as a separate contractual agreement affecting only the National and the Bank. Whether it constitutes a sufficient basis for some direct claim against the Bank, is interestingly discussed by the dissenting opinion in the foregoing case of U. S. F. & G. Co. vs. Carnegie Trust Company.* (R. 192).

"We submit that both upon principle, as a plain matter of contract, and upon the authority of the case above mentioned, there is nothing in the National's so-called indemnity agreement with the Bank that gives it any standing or any rights *in the present litigation.*" (R. 193).

> "It follows, therefore, that the National, neither through its creditor, the Treasurer, nor through its principal, the Bank, has acquired any rights, and that under neither rule is it entitled to subrogation. The National is claiming rights of subrogation under facts and circumstances where no such rights can arise." (R. 193).

It should not be overlooked that the petitioners have offered in their brief and can offer, no explanation of these statements made by them in said other action. However, petitioners now contend in their brief in this Court at the bottom of Page 74 thereof, "It was necessary to determine the rights of the National under its indemnity agreement in order to make the adjudication of all the issues involved in the former suit."

It is apparent from the excerpts from the brief of the American in said action that the only question that was involved in said action was the said right to subrogation, and that in reply to what was said in the brief of the respondent in said Circuit Court of Appeals with reference to said Indemnity Agreement, that the American contended that such an agreement was not involved in said case, and that if such right did exist, it would be the subject of a direct claim against the bank and an independent suit thereon. Apparently the trial Court agreed with such contention, for nowhere in the decree of the Trial Court nor in the opinion of the Circuit Court of Appeals is said Indemnity Agreement mentioned. *The Court agreed with counsel for the American that the rights acquired by this respondent under said Indemnity Agreement were the subject of an independent suit against the receiver of said bank, based solely upon the rights acquired thereunder. The petitioners herein, having made such contention with respect to the Indemnity Agreement herein sued upon, are estopped from now claiming that the question of the right of this Respondent to recover against said bank upon said Indemnity Agreement, as a separate and independent matter apart from subrogation, was decided and adjudicated in said other action.* In other words, they would now contend that a matter which they contended was immaterial to the issue in the former case and with which contention the Court agreed and therefore did not decide, is now res judicata in this action. It is inconceivable that such is the law, and that these Petitioners may blow both hot and cold.

The decree in said action is based, as clearly appears from an examination thereof, as well as from the opinion of the Circuit Court of Appeals, upon the equities of the American Surety Company and the National Surety Company, *only upon their respective rights of subrogation to the funds arising from dividends upon said deposit and the sale or other disposition of said Crystal Lake bonds.* As the Circuit Court of Appeals held in its decision herein:

> "It is clear that the parties, the trial court, and the appellate court, were of the opinion in the former suit that the National Company's direct claim against the bank on its contract of indemnity and the right to dividends thereon were not there involved. The prior right of subrogation to the dividends on the claim of the county and to the proceeds of the Crystal Lake bonds was the sole issue litigated, the sole question determined by the decree, and the sole question passed upon by this court on appeal. The right of the National Company, because of its contract of indemnity, to participate in the dividends payable on the deposit of Groesbeck as Treasurer was denied, but the right of the National Company to participate in dividends as a general creditor upon the contract of indemnity was neither considered nor determined.
>
> "The cause of action asserted by the National Company in the former suit was predicated upon its alleged right of subrogation. The cause of action sought to be enforced by the National Company in this case is predicated upon its contract of indemnity. It is a cause of action which is wholly independent of, and entirely separate and distinct from, the alleged cause of action asserted by the National Company in the former suit. Since the National Company seeks relief in the instant case upon a *different and distinct cause of action* from the one asserted by it in the former suit, the judgment in the former suit is conclusive only as to such points or questions as were actually in issue and adjudicated therein." (R. 237).

Petitioners complain that in the Centropolis case the Court "did not hold that the Indemnity Agreement was not a proper subject of litigation," but that in the instant case the Court held that the Indemnity Agreement "was

not a proper subject for litigation in the former suit." In the Centropolis Bank case the surety company was the plaintiff and brought its action directly against the receiver of the bank upon its Indemnity Agreement, just as in the case at bar, while in the former suit, this Petitioner was interpleaded as a party defendant in an action brought by the American Surety Company against the receiver to obtain subrogation to the rights of the county in and to the dividends to be paid by the receiver upon the public deposit, and by said order of interpleader, this Petitioner was required to set forth its claim by subrogation in and to the specific funds which were the subject matter of said suit, to-wit, the dividends upon said deposit. The former action was, as stated many times by the American, merely a contest between the surety companies as to their rights of subrogation in and to said dividends.

The receiver and this Petitioner were not adversary parties in the other action, no issue was joined between them. In the case of Central Banking & Securities Company vs. United States Fidelity & Guaranty Company, 80 S. E. 121, the Court said:

> "It is the general rule that parties to a judgment are not bound by it in a subsequent controversy between each other unless they were adversary parties in the original action."

V.

AUTHORITIES ON RES JUDICATA.

Petitioners assert that the decision herein is in conflict with the decisions of other Federal Courts with respect to the question of res judicata. If we simply assume as petitioners do, that the same cause of action is here involved as was in the other action, then, of course, the cases cited by petitioners are applicable. However, in view of the findings made by the Circuit Court of Appeals in this case with respect to the facts, issues and decrees in the two actions, the theory upon which each case was tried, the subject matter of each of the said actions, the manner in which the parties came before the Court, and the purposes of each of the two actions, and the citation of the authorities applicable to the situation, where the causes of action are separate and distinct, as set forth in the very able opinion of the Circuit Court of Appeals herein, it seems wholly unnecessary to

take the time to further discuss this feature of the case. We regard the record as above set forth and the able opinion of the Court as conclusive of this matter. We might repeat here our argument and the authorities cited by us in this case before the Circuit Court, but no justification for so doing occurs to us. The decision of the Circuit Court herein so clearly disposes of every contention made by the Petitioners and applies the law with such accuracy and understanding, that it seems to us incomprehensible that the petitioners should still persist to argue this question.

VI.

CASES ALLEGED TO BE IN CONFLICT.

Petitioners state that the decree herein "is squarely in conflict" with the decision of this Court in the case of United States Fidelity & Guaranty Company versus Wooldridge, 268 U. S. 234, 69 L. Ed. 932, and the decision of the Sixth Circuit Court of Appeals in the case of Springfield National Bank versus American Surety Company, 7 Fed. (2d) 44, and the decision of the Ninth Circuit Court of Appeals in the case of Fidelity & Deposit Company versus Robinson, 7 Fed. (2d) 571.

It is apparent from an examination of the latter two cases that the decision in each of them is based upon the decision of this Court in the Wooldridge case, supra. An examination of these three cases will disclose that they are not at all similar to the case at bar, that they involve merely the question of a set-off, and that the question here involved, to-wit, the surety's rights to recovery directly from its principal upon its indemnity agreement, was not at all involved or considered in that case. In the Wooldridge case the surety had paid to the railway company the penalty of its depository bond and thereby became subrogated to the rights of the depositor railway company against the insolvent bank, and sought to set-off its claim arising through such subrogation against the claim of the bank's receiver against the surety on its fidelity bond executed in behalf of the president of the bank. The fidelity bond was in the amount of $25,000.00 and the amount paid to the railway company by the surety under its depository bond was the sum of $23,312.51. The amounts being about equal, the surety sought to escape payment to the receiver of the penalty of the bond executed by it for the president of the bank, by off-setting against it the claim accruing to it by sub-

rogation on account of the payment by it to the railway company, to whose rights it claimed succession by subrogation. Had the surety paid the receiver the penalty of its fidelity bond it could have required the allowance, as against the receiver, of its claim arising out of the payment to the railway company, and received dividends thereon, and to this procedure no objection could have been made. However, the surety was not content to file its claim and receive a portion of its money back by way of dividends thereon, but sought to be discharged of its indebtedness on the fidelity bond, dollar for dollar, by off-setting one transaction against the other, which was manifestly inequitable and wrong, for the reason as stated by this Court, "There would be no equity in allowing the railway company (and the surety company as its subrogee) a special claim against this bond." This Court stated that "The two transactions were wholly independent transactions and were not brought into mutual account by the parties. The Guaranty Company after the insolvency of the bank could not have bought a claim against the bank and used it as a set-off." It is manifest that there was involved in that case an entirely different situation from that in the case at bar. To state it another way, the surety in the Wooldridge case, by reason of its payment of the penalty of its depository bond to the railway company, became subrogated by operation of law to its rights, and sought to have such *subrogation* "related back" to the date of the execution of its bond, in order that it might set-off its claim so arising by subrogation against an indebtedness due from it to the bank, arising out of a separate and independent transaction, between which transactions there was no identification and no agreement to bring them into mutual account.

In the case at bar we do not claim any rights by subrogation, nor did we assert any right of set-off. These questions were not at all involved in this case, and the question here involved was not before this Court in the Wooldridge case. We are merely asking that our contract with the bank be recognized as a binding obligation upon the receiver, creating the simple contractual relationship of debtor and creditor. The equitable doctrine of set-off and the fiction of *subrogation by relation back* are not involved in this case, and it is incomprehensible why the Wooldridge case and the cases from the Sixth and Ninth Circuit Courts of Appeal above referred to, should be cited to this Court as authority for any question involved in this case.

In the case of the Fidelity & Deposit Company of Maryland vs. Robinson, from the Ninth Circuit, above referred to, the facts were identical with those in the Wooldridge case, and the case is summarily disposed of on the authority of the latter case. The same is true of the case of the Springfield National Bank vs. American Surety Company, from the Sixth Circuit, above referred to. In that case the amount of the depository bond was $50,000.00 and the fidelity bond was for the same amount, and the facts and situation of the parties were identical with the two foregoing cases. The Court there stated:

> "The two bonds were seperate transactions, totally lacking in contact. Courts of equity hold that the requisite mutuality exists where the transactions are such as to raise a presumption of reciprocal credits, or an agreement for a set-off. But the presumption cannot be indulged here. Each bond was independent of the other. It could not be supposed that when the bank agreed to indemnify the surety on the depository bond it relied on the latter's reliability on the cashier's bond (not then in existence) in the event of his defalcation or as a means of discharging it to a liability that it thereafter assumed for a wholly separate consideration. * * * The case is within the principle announced in the Wooldridge case."

It is therefore apparent that the three foregoing cases are in no sense in conflict with the case at bar. We shall not discuss the cases of Storing vs. Sutsman, 210 N. W. 653, Veigel vs. Converse, 210 N. W. 162, Gilbertson vs. Northern Trust Company, 207 N. W. 42, cited by the petitioners, for the reason that those cases are decided upon the authority of the Wooldridge case, supra, and are likewise not in point on the facts and can, of course, add nothing to the force of authority of the Wooldridge case. In order to assert a conflict between those cases and the instant case, petitioners are obliged to rely upon what the courts in those cases did not pass upon and did not discuss, and to contend "that no distinction can be made between refusing to allow the surety's claim as such and refusing to allow a credit by way of set-off therefor." We submit that the two propositions are entirely different and easily distinguishable. The confusion on the part of petitioners results from their failure to distinguish between the surety's equitable right of subrogation arising from substitution to the claims of the

creditor, and its separate and independent contractual rights against its principal arising out of its contract.

Petitioners cite the cases of Maryland Casualty Company versus Fouts, 11 Fed. (2d) 71 (Fourth Circuit) and Zimmerman versus Chelsea Savings Bank, 125 N. W. 424 (Michigan), as being in conflict with the decision in the case at bar. An examination of those cases will disclose that the surety company in each of these cases claimed to be subrogated to the rights of the state, notwithstanding the fact that the state in each case had not been repaid in full the amount of its deposit in the insolvent bank.

In the Zimmerman case the question of a right based upon the Indemnity Agreement was in no way decided, and not even remotely referred to in the decree or opinion of the trial Court, nor in the *opinion* of the Supreme Court, neither upon the original hearing, nor in the opinion upon the rehearing, found at 127 N. W. 351. It is manifest, from an examination of the opinion in that case, that the only questions *considered or decided* by the court in that case were the following:

1. That notwithstanding that the surety company paid the entire penalty of its bond, and that there was an attempted limitation therein as to the liability of the surety therein, yet so far as the question of *subrogation* was concerned the bond stood behind the whole deposit and not behind only that portion of the deposit represented by the amount of the bond.

2. That inasmuch as the state had not been repaid in full for its loss of the funds in said bank, that the surety acquired no *subrogation to the rights of the state* until the latter was paid in full.

3. That if the state had a preference right to be paid out of the funds of said bank, said right exists as a prerogative of sovereignty, but that "such question is not presented for decision in this case unless, assuming the right to exist, the intervening surety may insist upon the exercise of the right by the state."

The Court, after reviewing many decisions with reference to the question as to whether such sovereign right became vested in the state by reason of the common law, decides the question by stating that the surety, in the absence of such an assertion by the state, could not sua sponte assert such right. Therefore, it is apparent that the only

questions considered and decided by the court in that case were the surety's contention "that so much of the deposit as it secured was a separate and distinct deposit and debt and that therefore it has paid the debt in full and is entitled to that extent at least *to be subrogated* to the claim of the state against the bank," and the right of the surety to succeed by *subrogation* to the alleged sovereign right of the state. The surety company petitioned for a rehearing, as above noted, and the only question referred to or decided in the opinion of the court upon rehearing was the denial of the existence of the right of the surety to succeed to such sovereign right. *No reference was made, either in the original opinion or in the opinion on rehearing, as to the rights, if any, acquired by the surety by reason of its Indemnity Agreement.* It is apparent that the foregoing case is not in conflict with the case at bar.

In the case of Maryland Casualty Co. vs. Fouts, 11 Fed. (2d) 71, cited by the petitioners, the right of the surety company to subrogation was denied until the creditor, the state, had been paid in full. The amount of the state's deposit was $89,579.14, of which the surety paid $50,000.00 thereof, the full penalty of its bond, and then claimed the right to be *subrogated* to that extent to the rights of the state. The Court said:

> "*The right of subrogation* for the amount paid by appellant to the state depends upon whether the sum paid was in full of the liability on the indemnity bond or only on account thereof. * * * The penalty of the bond in this case, it is true, was $50,000.00 and subsequent to the bank's failure the amount of the penalty was paid by the surety; but the whole obligation of the state was by no means extinguished. On the contrary, there remained a balance of $39,579.14 due. * * * To allow this to be done would operate most unfairly against the state, whose debt was secured, and hence shows why the right of *subrogation* in such circumstances as in this case cannot be considered. *The doctrine sought to be availed of rests upon purely equitable principles.* The fact of the indebtedness on account of which the surety was given, not having been paid in full, alone requires the denial of the relief prayed for, as the right of *subrogation* cannot be availed of to collect an indebtedness by one himself liable for the debt and which obligation he has not met."

While the Indemnity Agreement is referred to in the statement of facts in the opinion of the Court, the matter of the surety's right to recover on its Indemnity Agreement was not presented squarely to the Circuit Court of Appeals for determination, nor was this question actually or necessarily determined by the Court in that case. The entire discussion of the Court is confined to the question of subrogation and the citation of cases relating to that principle alone. The Court said:

> "The doctrine sought to be availed of rests entirely upon equitable principles."

The claim presented to the receiver was based upon the alleged right of the surety to succeed by subrogation to the rights of the state and under the circumstances the receiver could not do otherwise than deny such claim. The question of the surety's legal right to direct indemnity as against its principal was used by the surety company in an effort to bolster up its equitable claim of subrogation rather than as the fundamental foundation of the suit. The action was in equity and the legal rights of the surety were in no way considered or decided or even referred to in the opinion. In writing the opinion, the court had in mind simply the question of subrogation.

That case is readily distinguishable from the case at bar, for the reason that the surety claimed to succeed to the rights of the state by *subrogation*, notwithstanding that the state had not yet been repaid in full, while in the instant case the county has long since been repaid in full and the action is not based upon subrogation to the rights of the county, but is a separate and independent claim against the receiver, arising out of the contract. In the above case the rights acquired by the surety under its Indemnity Agreement were apparently not urged by it upon the Court as a separate and independent ground for recovery, for this question is not at all considered or commented upon by the Court. Furthermore the deposit was not made pursuant to a depository law such as Section 4500, C. L. Utah, 1917, no other bonds were given by the bank, and the presumption, therefore, was that the bond in question was security alone for the whole deposit, at least so far as the question of subrogation was concerned. It is therefore manifest that there is no conflict between that case and the instant case, but on the contract, the doctrine therein announced with respect to

subrogation is wholly in accord with the weight of authority and in accordance with the decision of the Circuit Court of Appeals in the other case, claimed by the petitioners to be res judicata of the issue here involved.

In the case of United States Fidelity & Guaranty Company vs. Centropolis Bank, 17 Fed. (2d) 913, the contemporaneous case upon which the surety aspect of the instant case is decided, the surety claimed by right of subrogation as well as by contract of indemnity, but as the Circuit Court of Appeals says, "abandoned any claim under the right of subrogation and predicated their case squarely upon the contract of indemnity." It is manifest that in the Fouts case, above referred to, that while likewise both rights were originally claimed, the surety abandoned any claim by reason of its contract of indemnity and based its claim squarely upon the equitable principles of subrogation. The Court in the Centropolis Bank case clearly draws the distinction between subrogation and surety's independent claim in its own right upon contract and states, "If the question here were one of subrogation we could readily agree with the contentions of counsel for the county," and after citing ample authority to the effect that the surety is a creditor of the insolvent bank, and that it is therefore entitled to have its claim allowed and to share in the distribution of the assets of the bank, states, "This conclusion has not been reached without a careful consideration of the opinion of the Fourth Circuit in Casualty Company vs. Fouts, supra, and the Supreme Court of Michigan in Zimmerman vs. Bank, supra."

The case of United States Fidelity & Guaranty Co. vs. Union Bank & Trust Co., 228 Fed. 448, cited by petitioners, was clearly one involving only the right of subrogation, as is manifest even from the excerpts quoted by counsel from that case. The same is also true of the other cases cited by the petitioners. For instance, in the case of Dixon vs. Bailey, 33 Atl. 705, the Court says:

> "Unless the surety pays the debt in full he is not entitled to *subrogation.*"

And in Columbia Finance & Trust Co. vs. Kentucky Ry. Co., 60 Fed. 974, cited by the petitioners, the following excerpt is taken from petitioners' brief:

> "If the surety upon paying partial payment, became entitled to *subrogation* pro tanto, * * * etc."

In the case of People vs. People Bros., 254 Fed. 989, cited by petitioners, the only question involved was one of subrogation, as is apparent from the excerpts quoted from the opinion in the said case and appearing in the brief of the receiver, particularly the following:

> "Unless the surety pays the debt in full, he is not entitled to *subrogation* * * * etc."

That case is well expressed in the syllabus, as follows:

> "The surety on the bond of the contractor, conditioned for the payment of claims for labor and material, which paid only sixty-five per cent of the claims of creditors secured by the bond, on completion of the contract by a receiver, was not entitled by *subrogation* to the amount due thereon until claims for labor and material were paid in full."

The case of Board of Health v. Teutonia Bank & Trust Co., 68 So. 749, cited by petitioners, was also a case involving merely a right of the surety to succeed by subrogation, and in which the Court said:

> "There can be no *subrogation* to a right of another unless the claim of that other is fully satisfied."

No question was involved in that case of the right of the surety to recover directly from its principal by reason of an Indemnity Agreement, the only question there involved being the right of the surety to succeed by subrogation to the rights of the creditor against the bank. The same is true of the case of Fidelity & Deposit Co. of Maryland vs. Wilkinson, 69 So. 865, cited by the Petitioners. The same is also true of the case of Bank of Fayetteville v. Lorwein, 88 S. W. 919, cited by the petitioners, in which case the Court said:

> "The right of *subrogation* cannot be enforced until the whole debt is paid."

It is therefore apparent that none of these cases cited by petitioners have any bearing upon the right of a surety

to recover directly against its principal upon a contract of indemnity, as decreed in this case.

All the other cases cited by petitioners on pages 41-57 in their brief are cases which involve only the question of subrogation, and to the effect, in accordance with the great weight of authority, that the surety cannot succeed by subrogation to the rights of the creditor until the latter has been paid in full. We do not and even if we were so disposed could not dispute those cases laying down such to be the rule as to subrogation. In fact, the Court in its decision in the other case, determined that question, and it would seem to us to have been sufficient for petitioners to have cited and relied upon that case alone as to the rule of subrogation. However, that case and the other cases cited by the petitioners with reference to the question of subrogation have no application whatever with respect to the question of respondent's right to proceed directly against the bank as a separate and independent matter, based solely and wholly upon its Indemnity Agreement, as decreed by the Circuit Court herein. Petitioners have nothing to say with reference to the established principle that a surety has two rights of action, to-wit, under certain circumstances to the equitable right conventionally transferred by operation of law to subrogation to the rights of the creditors, as well as the right to reimbursement directly from its principal as a separate and independent matter.

It serves no purpose for petitioners to argue general principles with respect to subrogation and which have no application to the concrete facts here involved. No one questions the general rule with respect to subrogation. The former action was just such a case; that is to say, one of subrogation; and the Court in that action followed the rule of law laid down in those cases with reference to subrogation. These elementary rules with respect to subrogation are sustained by ample citation of authority in petitioners' brief, as is also the principle that the surety has no rights superior to those of the principle and cannot be placed in a more favorable position than the principal so far as subrogation is concerned. Petitioners' Brief 69-70. These general statements from Cyc. cited by the petitioners, are found, as would be expected, under the heading "Subrogation". It is obvious that statements from texts and cases illustrating the general rule applicable to subrogation are beside the question here involved, and illustrate the failure of petitioners to

distinguish between subrogation and indemnity. But when petitioners come to the real question here involved, there are not only no authorities cited, but very little is said by way of argument or reason in support of the proposition which petitioners must sustain in order to obtain the writ applied for.

VII.

DISTINCTION BETWEEN SUBROGATION AND INDEMNITY.

It is of course elementary and perfectly obvious that there is a vast distinction between subrogation and indemnity. Petitioners have confused these two remedies to which respondent is entitled and contend that because the Court in the other case denied to respondent the right of subrogation to the rights of the creditor to the dividends to be paid by the defendant receiver upon the deposit of the public funds of Salt Lake County, that such decision therefore decided and concluded the rights of the respondent to claim reimbursement directly from the bank, as a separate and independent matter, based solely and directly upon the Indemnity Agreement executed by the bank to the respondent as the inducement and consideration for the execution of respondent's bond.

The distinctions between subrogation and indemnity are fundamental. Subrogation is not a matter of strict right, but is founded and created on the principles of equity and benevolence. The contract herein sued upon is a contract enforcible at law, based upon contract and as a matter of strict right. The right of subrogation does not depend upon privity of contract, it is independent of any mere contractual relation existing between the parties to be affected by it. One taking by subrogation takes only such rights as had the person to whom he succeeded, the subrogee taking it subject to the limitations, burdens and disqualifications in the hands of his predecessor, while the indemnitee is limited only by the conditions and terms of the contract itself. It is apparent that a surety may be entitled to subrogation and yet may not be entitled to reimbursement. This is true as in cases of subrogation granted as against third parties with whom the surety has no contractual relation. Conversely, as in the case at bar, a surety may not be entitled to subrogation and yet be entitled to reimbursement. The surety's

right of subrogation as against the debtor does not arise until the debt has been paid in full, while under an Indemnity Agreement the surety can proceed against the principal himself to make him pay, even though the surety may have paid only a part of the debt.

In re Freeman & Co., 1 Fed. (2nd) 430, the Court stated the rule that subrogation is not a matter of contract but of equitable right.

In Northern Finance Co. v. Byrnes, 5 Fed. (2nd) 11, the Court commented on the rule that subrogation does not arise from contractual relations but is an equitable doctrine to accomplish substantial justice.

> "It is not necessary to pay the entire debt, as indemnity may be enforced upon part payment to the extent of the amount paid." Stearns on Suretyship, 3rd Ed. page 507.

In re Kimbrough-Veasy Co., 292 Fed. 757, the Court stated the rule as follows:

> "If a surety pays anything on the debt, he is instantly vested with a right of action for his reimbursement against the principal, and if he pays all, he is subrogated to the creditor's position and securities.
>
> "Subrogation is, in most cases, rather an additional remedy than an additional right, and may exist concurrently with, and as a further security to, the right to a simple action for reimbursement or exoneration. The fact that a party entitled to reimbursement and also to subrogation is entitled to two distinct remedies, seems often to be overlooked, to the confusion of both doctrines."
>
> Clark's Principles of Equity, (1924) page 605.

Petitioners' confusion in failing to distinguish between subrogation and indemnity is well illustrated by the following statement from Page 53 of their brief:

> "The limited rights which the National has in this case *spring from payment* * * * and the same reasons and the same motives have operated in the law to raise up and confer upon the surety the rights of indemnity and the rights of subrogation.

> Both rights are *conferred* upon the surety by *operation of law.* * * * A situation which has already required the Court to withhold subrogation must of necessity require it to withhold indemnity."

VIII.

ALLEGED CONFLICT BETWEEN DECISIONS OF THE EIGHTH CIRCUIT COURT IN THE TWO CASES.

Petitioners contend that the decision in the instant case conflicts with the decision in the other case because "the same fund is involved and that the decree in the first action provides that the National should receive nothing until it, the American, is paid in full;" and denied the right of the National "to in any manner deplete the funds out of which the American was to be made whole." Petitioners place a strained and unjustified interpretation upon the decision in the first case, by adding to and reading into it, that which was expressly omitted by stipulation of the parties and that which was not involved nor determined by the Court.

The Circuit Court of Appeals, in considering its own decision in the other case, properly held that it did not deny therein the right of this petitioner to reimbursement from the general assets of the bank as such, but merely the right to subrogation to dividends upon the county's deposit until the American had been paid. It is manifest that the decision in the instant case does not, as contended by the petitioners, "authorize the National to compete with the American in the enjoyment of the same fund", or, "deplete the fund out of which the American was to be made whole."

The respondent has paid the full penalty of its bond and has been postponed by the decree in the other action from sharing by subrogation in the dividends to be paid upon said deposit until the American has been repaid in full, and this too, notwithstanding that its loss is entirely due to its principal's failure to take adequate security, and that such delayed right of subrogation means nothing at all. Upon that portion of the deposit guaranteed by this petitioner, the treasurer has received not only one hundred cents on the dollar, but has also obtained a decree to the effect that this petitioner cannot share in subrogation to dividends upon said deposit until his surety, the American, has first been paid in full. It would appear to us that when the treasurer had his claim allowed in his name and for the

full amount thereof, that he had received all that he was entitled to receive from the bank, yet now his surety would claim the right to intervene in this action in order to deny to this petitioner the right of reimbursement. The petitioner, when it executed its depository bond herein, did not agree that it would not present any claim against the bank for any loss that it might sustain thereunder, and the treasurer himself having been obliged to execute a similar indemnity agreement to the American, was aware that the bank in obtaining the depository bond for him, must necessarily incur an obligation therefor. By reason of just such Indemnity Agreement, as petitioner sued on in this case, the American will receive every penny of its money back, with interest thereon at the rate of eight per cent.

IX.

PURPOSE AND PENALTY OF RESPONDENT'S BOND.

Petitioners contend that respondent's bond was security for the whole deposit. This contention is so completely answered in the opinion of the Circuit Court in the Centropolis Bank case that little more need be said in answer thereto. The Court among other things states that, "The recital in the bond that the penal sum thereof is $50,000.00 just as effectually limits the language of the condition as if there had been written into the language of the condition itself the words 'up to and including but not exceeding $50,000.00.' " (17 Fed. [2nd] 918).

Respondent's bond herein was given pursuant to Section 4500 of the Comp. Laws of Utah, 1917, to protect that portion of the public funds in an amount equal to the penalty of its bond. This Section required the treasurer to take and the bank to give "collateral security or good and sufficient surety company bonds, or personal bonds sufficient in amount to fully protect such funds." Under generally accepted legal principles this section became part of and was incorporated into respondent's bond as if it had been actually written into it. It is manifest, from a reading of this section and the action of the bank in giving, and the treasurer in taking, security in addition to that given by respondent, that it was not the intention of the law or of the parties that respondent's bond was security for the whole deposit in the sense that upon payment of the penalty of its bond, it had no claim for reimbursement. The Circuit Court

in its opinion in the Centropolis Bank case further said, "It is true that the liability under the bond was not limited to any particular portion of the whole deposit. In that sense, the bond was security for the whole deposit and for that reason the right of subrogation does not exist, but the maximum amount for which the surety company could be held liable thereunder was expressly fixed at $50,000.00. The surety company has discharged that liability by payment in full. The county has received all that it contracted for from the surety comany. How then can the county say that the spirit of the guaranty will be violated?"

The intent and purpose of the Statute (Sec. 4500) and respondent's bond given pursuant thereto was to protect the public deposit. The County has been repaid in full and the letter and spirit of the law have been complied with. Petitioners refer to "Groesbeck's deposit" as if it were a separate and distinct deposit apart from that of the county, and state that "Groesbeck's deposit has not been repaid in full." There was but one deposit and that in the name of Salt Lake County, and that has been repaid to the county in full and in part by the payment by this respondent of $125,000.00 and in part by the payment by the American of the penalty of its bond in the sum of $200,000.00. Since the county has been paid in full there is no further liability to it on the part of Groesbeck.

Where there are statutory provisions relating to the deposit of public funds, there is no authority to make the deposit except to the extent and on the terms and conditions described, 18 C. J. 580. The purpose of said laws is to provide a safe place for keeping of the public funds, and at the same time to enable the public to receive compensation for the use of its funds. Statutory provisions relating to depositories should be read in connection with the bond. As is said in the case of Talley vs. State, 121 Ark. 412, 180 S. W. 330, "The purpose of the statute authorizing the deposit of public funds is to give the county a speedy and efficacious remedy for recovery from the depository regardless of the financial condition of the depository." In this case the National Surety Company had the right to rely on the treasurer's keeping the amount of the deposit within the amount of protection taken by him. Freemont County vs. Freemont County Bank, 115 N. W. 925. The deposit was in the name of the county. Mr. Groesbeck testified upon the trial of this case as follows:

> "In drawing against that account, I was required by law and by the bank as well to secure the

> counter-signature of the County Auditor on all checks drawn by me. As a matter of fact, I had occasion to draw few checks on this account, that is, comparatively few. All warrants drawn against this bank account in the payment of salaries to employees of Salt Lake County and for bills incurred by it, are drawn and signed by the County Auditor and not the Treasurer. In other words, the Auditor drew all checks and warrants against this account, except as it might be necessary to transfer to the state or other political subdivisions of the state, their portion of the tax money collected, and then in such event I drew the check but was obliged to have the countersignature of the County Auditor. Therefore, all bills, County Bills and County expenses, were paid for by the Auditor drawing the warrants against this deposit. That is the law." (R. 157).

The Supreme Court of Utah, in the case of National Surety Company vs. Pixton, State Bank Commissioner, 60 Utah 289, 298, 208 Pacific 878, had occasion to construe said Section 4500 of the Comp. Laws of Utah, 1917, and the purposes thereof. In that case the surety, having paid to the state treasurer the amount of the state's deposit, sought to be subrogated to the alleged sovereign right of the state to the dividends to be paid upon said deposit. The Court said:

> "Under the banking laws of this state, *the state*, by its acts and conduct has clearly indicated that it claims no preferential right over the other depositors. While the law authorizes the state treasurer to deposit the funds of the state in certain banks, it also compels him to require the bank to secure the repayment of the funds so deposited. If *the state* were relying upon its preferential rights, its funds would be amply secured without requiring any security of that nature. * * * The state could well place itself upon the same footing as other depositors. This, it seems to us, it did by the passing of the banking laws and in authorizing the state treasurer to deposit the state funds in banks as others deposit their funds."

From the foregoing it is clear that the respondent's bond was given for protection of the county and its funds rather than for the protection of the treasurer or his surety, as contended by the petitioners herein. The County has al-

ways assumed the right to deal directly with the depository bondsmen, to collect from them directly, and to view the depository bonds as part of the County's security. Mr. Groesbeck himself testified on the trial of this action that the respondent paid the penalty of its bond in the sum of $125,000.00 *to Salt Lake County.* (R. 155). As the record shows, the treasurer's bond was but $200,000.00, and this too, notwithstanding the fact that the treasurer collects each year the taxes for the state, city and county, amounting to in excess of eight million dollars, and at the time of the failure of the bank, had on deposit in excess of $643,000.00. Section 4500 contemplates that the county treasurer shall take depository bonds and collateral security and that he shall do so by way of protection to the County. If the taking of depository bonds is merely a matter in which the treasurer is personally interested and with which the county has nothing to do, what was the necessity for the legislature enacting such a law? The very language of the act itself indicates beyond question that the bonds therein provided for are for the protection of the public funds.

In the case of Cole vs. Myers, American Surety Company, et al., 100 Neb. 480, 160 N. W. 894, the Court said:

> "The bond was given to protect legal deposits of county funds to the contractual and statutory maximum of $10,000.00 and not as security for illegal deposit in excess of that sum. Both the surety's liability and the debt protected by the suretyship are limited to $10,000. In paying the amount of the bond the bank's surety not only discharged its legal liability but also discharged the entire debt to secure which the bond was given. The terms of the contract of suretyship, when considered with the statute and with the public duties of the treasurer, will admit of no other construction."

The record herein and the admission of the American in its brief relative to the receipt by it since the trial herein of the sum of $90,000.00, on account of the Crystal Lake Bonds, conclusively shows as we shall hereafter point out that the American has been repaid by the bank the full penalty of its bond, together with over $15.000.00 interest.

The American complains that by the allowance of respondent's claim, the receiver will be obliged to pay it immediately the same dividends as heretofore paid to the other

creditors, to-wit, sixty per cent, and that this will amount to $75,000.00, but that inasmuch as the county's deposit was more than one-third of all the approved claims, that one-third of every dollar paid the respondent will be at the expense of the American; also that by reason of the decree herein the American "will be short thousands of dollars", and hence, the decision herein is inequitable. While such argument is not a legal argument, and even if true would not be material to the decision of the question here involved, yet feel that we should point out the discrepancies therein. The total amount of approved claims against the bank was $1,583,926.88, (R—70), and therefore the allowance of respondent's claim by the Trial Court and the Circuit Court of Appeals increased the approved claims by $125,000.00, or less than one-tenth additional. Sixty per cent in dividends have been paid so far by the receiver. The county has been repaid the full amount of its deposit in the manner shown at page twenty of petitioners' brief. As hereinbefore pointed out, the addition of respondent's claim increases the approved claims by less than ten per cent, hence it is difficult to see how it will reduce payments to the American by one-third.

Moreover, the American will not be short "thousands of dollars" by reason of the allowance of our claim as it represents. In fact, at no point in its application or brief herein does the American make a disclosure to this Court either as to the amount of money already received by it pursuant to the decree in the other action, or as to the balance yet claimed to be due it. *The facts* are these, the American did not pay to the County the penalty of its bond in the sum of $200,000.00 until February 29, 1924, more than two years after the failure of the bank, and after a judgment agaist it in favor of the County was affirmed by the Supreme Court of Utah, (R—97), said judgment being for the sum of $200,000.00, the penalty of its bond, together with $23,-262.13 interest on said sum from the date of institution of suit therefor. (R—78, 97).

Upon the trial of this case it appeared that the American had received from the receiver through subrogation to the dividends upon the deposit of the funds of the County, the sum of $125,780.72. (R. 125). The receiver alleged in his answer herein (R. 26), and upon the trial of the action testified that he had paid sixty per cent in dividends and expected to pay an additional fifteen per cent dividend. (R. 70). Mr. Jensen, attorney for the American, stated to the Court upon the trial of this action, "There is a balance due the Amer-

ican of $125,666.00. (Including interest). If an additional fifteen per cent is paid it would run around eighty-eight thousand dollars, and after the payment of that amount the American would still be short $40,000.00." (R—73). However, *since the presentation of this case to the Circuit Court of Appeals, the Crystal Lake bonds, which the receiver in Paragraph 24 of his Answer herein (R—26) alleged, "are worthless, and no money has been or can be realized therefrom", have been sold for $90,000.00 by the American pursuant to the decree in the other action.* While this is admitted in petitioners' brief at Page eighteen thereof, no statement whatever is made as to the amounts repaid to the American or the balance yet claimed to be due it. So that the American, according to the record herein, has to date been reimbursed on account of the penalty of its bond, $125,780.72 by dividends paid to it by the receiver, together with the further sum of $90,000.00, arising from the sale by it of the Crystal Lake bonds, a total of $215,780.72, which amounts to $15,780.72 in excess of the penalty of its bond; and assuming it is entitled to interest as claimed by it, to the date of payment by the receiver, it will further receive according to the receiver's best judgment, even with the allowance of our claim, seven per cent additional in dividends on $568,094.29, which will amount to approximately another $40,000.00, or a total of approximately $255,780.72. It appears to us that instead of being entitled to sympathy, the American is to be congratulated as being the only creditor of the bank to be paid not only its claim in full, but approximately $55,780.72 interest thereon, and this too, notwithstanding that according to the receiver's best estimate he will be able to pay creditors (with the allowance of respondent's claim) only sixty-seven per cent.

However, even if the decree herein should occasion a slightly smaller recovery to the American, and that by way of interest only, it is no reason for setting aside and abrogating the valid contract made between the bank and respondent.

X.

THE NATIONAL BANKING ACT

Petitioners complain that, "The penalty of the National's bond never went in to the assets of the bank for ratable distribution to the creditors," and that therefore the decision herein results in an unfair distribution of the bank's

assets among its creditors, in violation of the national banking act. Just why this should have been done in order to justify the allowance of respondent's claim as herein decreed, we do not understand, nor is it made clear by the petitioners. Clearly respondent was a creditor of the bank and had its claim not been allowed it would have been a violation of respondent's constitutional rights. The obligation of the bank to the county and its obligation to this respondent were entirely separate and independent matters. The question here involved is not the bank's obligation by reason of the deposit, but its obligation to this respondent by reason of the express contract, by reason of which it became a creditor of the bank. To deny respondent the rights of such a creditor would have "eventuated in an unfair distribution of the bank's assets among its creditors."

Petitioners contend that the effect of the decision herein is to permit the deposit of public funds to draw additional dividends, but this contention entirely overlooks the fact that respondent's rights under its Indemnity Agreement are in its own right entirely independent and apart from the rights of the depositor, and that the payment decreed to it is not on account of the deposit but by reason of a separate obligation. Moreover, the county has been repaid in full and in part by this respondent of $125,000.00 of its obligation. It is not a question of the public deposit drawing further dividends, but of the right of this petitioner to recover upon its express contract. However, Petitioners entirely overlook the fact that the Indemnity Agreement herein sued upon gives the respondent any rights.

> "It often happens that the same transaction or state of facts gives distinct rights of action to or against different persons, or to the parties mutually against each other." Black on Judgments, 2nd Ed. Vol. 2, p. 1125.

The deposit here in question gave the county and the treasurer a right against the bank for a recovery of the money and in turn gave the respondent a right under its Indemnity Agreement to recover as against the bank for any loss that it might sustain. In other words, this deposit of public moneys made under the provision of Sec. 4500 of the Comp. Laws of Utah 1917, created two obligations on the part of the bank. If the bank borrowed the Crystal Lake bonds in order to pledge them as security for the repay-

ment of the deposit, it in turn incurred another obligation. The receiver does not complain that the proceeds of these bonds in the sum of $90,000.00 received by the American Surety Company, "never went into the assets of the bank for ratable distribution to its creditors." In other words, the receiver seems to appreciate that under said Section 4500 the bank may pledge collateral to secure the repayment of the public deposit, and in fact may borrow or obligate itself to secure the same, but is apparently unwilling to admit that the bank incurred any obligation to respondent by reason of its Indemnity Agreement herein, which was the consideration to respondent for the execution of its bond. This bond relieved the necessity on the part of the bank of furnishing additional collateral to the county to secure its deposit. The Circuit Court of Appeals could see no distinction between the bank pledging its own assets such as the Crystal Lake bonds and to which the receiver made no objection, and incurring an obligation to a surety company whereby it agreed to reimburse the surety for any loss it might sustain by reason of pledging its credit for and on behalf of the bank. The bond of respondent stood in lieu of further collateral and enabled the bank to keep its assets in its own vaults. Had the bank borrowed the Crystal Lake Bonds or executed an indemnity agreement to secure them, then such indemnity agreement would have been another enforcible claim against the bank.

XI.

THE CONTRACT SUED UPON.

Prima facie petitioner is entitled to recover upon the Indemnity Agreement herein sued upon. The authorities generally sustain the right of a surety to recover from its principal under such an agreement. Petitioners have not cited a single case to the contrary. As hereinbefore pointed out, all the cases cited by petitioners relate to the question of subrogation.

The Circuit Court of Appeals, in the instant case, decided against the petitioners the issue of res judicata raised by them, and founded its decison as to the merits of the case, that is, petitioner's right to recover upon its Indemnity Agreement, upon the decision of that Court in the case of United States Fidelity & Guaranty Company vs. Centropolis Bank, 17 Fed. (2d) 913. The petitioners attack the

the able decision of the Court in that case and contend that it is contrary to the weight of authority. The only cases cited by petitioners which bear any resemblance whatever to the instant case are those of Maryland Casualty Company vs. Fouts, 11 Fed. (2d) 71, and Zimmerman vs. Chelsea Savings Bank, 125 N. W. 424. We have heretofore, in our brief, reviewed these two cases and pointed out the distinction betwen them and the instant case. At first blush the Fouts case might appear to be similar, yet a scrutiny of that case will disclose that the facts, the parties and the theory upon which the case was presented to the Circuit Court of Appeals, are altogether different from those in the instant case. In that case the depositor, the county, had not been paid in full and the surety company sought to be subrogated to the dividends to be paid upon the deposit of the county, prior to the payment in full to the county. The Fouts case was presented to the Court wholly upon the subrogation theory, just as was the former case relied upon by the petitioners herein as res judicata. In neither case did the Court decide the right of the surety to recover upon its Indemnity Agreement.

In the Zimmerman case the Court held that the surety acquired no subrogation to the rights of the state until the latter was paid in full, and no reference whatever was made either in the original opinion or in the opinion on rehearing as to the rights, if any, acquired by the surety by reason of its Indemnity Agreement.

The two cases last mentioned were urged by the petitioners upon the Circuit Court of Appeals in the Centropolis case, but the distinction between the questions involved in those two cases and the instant case, as well as the Centropolis case, were observed by the Circuit Court of Appeals in the Centropolis case, the Court stating therein:

> "This conclusion has not been reached without a careful consideration of the opinion of the Fourth Circuit in Casualty Company vs. Fouts, supra, and the Supreme Court of Michigan in Zimmerman vs. Bank, supra."

The cases cited by the Circuit Court of Appeals, in its opinion herein, United States Fidelity & Guaranty Company vs. Carnegie Trust Company, 164 N. Y. S. 92, 221 N. Y. 646, 117 N. E. 1086, American Surety Company of New York vs. National Bank of Barnesville, 17 Fed. (2d) 942, and

In Re Dailey and Ivins, 19 Fed. (2d) 95; Affirmed by the Third Circuit Court of Appeals in Tenant vs. U. S. F. & G. Co., 17 Fed (2d) 38, are not only directly in point, but are in accordance with the weight of authority that the surety is a creditor of the bank and has a right to have its claim allowed and dividends paid to it thereon.

The case of Mellette Farms Elevator Co. vs. Poehler Company, 18 Fed. (2d) 430, is also directly in point, and the Court in its opinion clearly distinguishes between subrogation and indemnity.

The sole question presented is the enforcibility of a contract. In consideration of its becoming surety, the respondent company received an agreement indemnifying it against loss on account of its suretyship. The loss was sustained, and payment made to and accepted by the creditor. The claim is now made for reimbursement. The promise to indemnify contained in the agreement of indemnity is admittedly valid. All of the authorities hold that it constitutes the promissee a creditor of the indemnitor, and its breach gives rise to an action at law. The Circuit Court of Appeals simply enforced our legal rights under this contract. The surety of course, has other rights—some of them are conditional and some are equitable. However, we seek none of these additional rights, and cases dealing with the effort of the surety to obtain other benefits are not in point. Our claim is based solely upon the direct and independent contractual obligation of the bank. Discussion of equities and rights which we are not seeking is obviously futile.

Respondent's claim is a valid and outstanding obligation against the bank, upon which a claim may be properly asserted against the receiver, just as on any other debt of the bank. The respondent is in the same position as a depositor or merchant who has supplied fixtures, gas, electric light, or the landlord to whom the rent is due. The National City Bank could not do business without having such creditors, nor could it do business with public funds as a deposit without giving a bond (Sec. 4500, C. L. Utah, 1917). The bonding company was as essential to its doing business as the landlord or the company which furnished light, gas or heat. It was one element and unit that went to furnishing the bank its business and to make it possible to do business. The decision of the Circuit Court is founded on basic principles and fundamental facts, to-wit, that a contract is a

contract, and means what it says, and that when an indemnitor on a bond pays out money for a principal on its obligation upon the promise of the latter to fully indemnify it, as in the case at bar, it is a creditor of the principal and on a par with all other creditors, including those who furnished supplies for the bank or who deposited money therein. Without this Indemnity Agreement respondent would never have signed the bond for the bank. Its premium was fixed on that basis. The language of the Indemnity Agreement made the respondent a creditor of the bank, and the bank therein pledged its *assets* to the discharge of such obligation. (R.-10). All that any creditor of the bank had was its obligation to pay, and some of these creditors only had that orally or by implied contract. All creditors of the bank are upon this same basis. The National Banking Act makes no distinction between creditors. What equity would there have been in the Court's holding that respondent's contract and the obligation to it was a mere scrap of paper, simply because the American would suffer a smaller recovery out of a loss it sustained by failure of the bank? The Circuit Court undoubtedly concluded that there was no injustice in respondent's participating in the assets of the bank on an equal footing with all other general creditors of the bank, and had the Court taken any other position we respectfully submit that it would have been illegal and in violation of the contract and of the constitution of the laws of the State and the United States.

The sole issue upon the appeal in this case, outside of the question of res judicata, was the right of the surety to enforce its Indemnity Agreement. Subrogation is not involved directly or in directly, and the discussion of subrogation accomplishes no purpose except to obscure the real question at issue. We respectfully submit that there will not be found in petitioners' brief any real discussion of the right of the surety to have its claim allowed by reason of the contractual Indemnity Agreement existing between the surety and the bank. Petitioners nowhere discuss that contractural relation, nor do they cite any law, authority or reason for the abrogation of the contractual right, and we respectfully submit that the cases cited by the Circuit Court of Appeals in its opinion in the Centropolis Bank case are directly in point.

Looking at the question as one of first impression, we respectfully submit that the fundamental principles of law,

justice and reason, justified the Circuit Court in upholding the contract of indemnity, as no just, valid or legal reason can be given for the abrogation of the contract or for arbitrarily setting it aside. To have done otherwise would have been in violation and stultification of the law. Petitioners have cited no cases involving the situation and question presented to the Circuit Court of Appeals.

Petitioners contend that the case of United States Fidelity & Guaranty Company vs. Carnegie Trust Company, 177 App. Div. 176, 164 N. Y. Supp. 92, affirmed 221 N. Y. 646, 117 N. E. 1036, cited by the Court in its opinion in the Centropolis Bank case, does not support the decision in that case, and to prove such assertion quote from the dissenting opinion. The view of the majority of the Court is expressed in the following language:

> "It does not follow, however, because the surety cannot be subrogated to the rights of the bankruptcy creditors that it has no claim for the moneys paid on the surety bond. The Carnegie Trust Company gave its Indemnity Agreement covenanting to make good to the surety company any moneys which that company should be compelled to pay under its bond. The surety company thus has become the creditor of the Carnegie Company to the extent of the required payment, and its right to its dividends cannot be impaired by the fact that the claim arises upon a payment of a deficiency upon another debt of the Carnegie Company, which has already had its full dividends. *To hold otherwise would hold nugatory the indemnity agreement.* The authorities holding that one debt of a bankrupt cannot create two liabilities against the estate apply only where a creditor is thus seeking an undue proportion of the assets of the bankrupt. No such result can be here reached and the surety's claim here arises as any other claim might arise, out of a contract which itself contemplates the possible inability of the debtor to pay a certain debt in full."

The foregoing opinion of the lower Court was affirmed by six of the seven judges of the New York Court of Appeals as is shown in 221 N. Y. Rep. 646, wherein, with reference to the facts it is stated:

> "The plaintiff offered for filing a claim against the Carnegie Trust Company in liquidation for reimbursement for the payment thus made. *The plaintiff founded its claim upon the indemnity agreement.* The defendant rejected the claim."

While that Court would not have accorded to the surety the right of subrogation until the creditor was first paid in full, it did allow the claim of the surety for reimbursement under its Indemnity Agreement as a separate and independent matter and obligation. Paragraphs 7 and 8 of the Indemnity Agreement (R. 61) of the respondent, are identical with the indemnity agreement considered in the case last mentioned above, and reserve the right to this respondent to look to and rely upon the property of the depository and its income and earnings and to follow and recover out of its property for anything due or to become due to the respondent under said agreement. This Indemnity Agreement taken by the respondent from the bank was the inducement for the execution of its bond, and was for the specific purpose of protecting the respondent, particularly in the event of the failure of the bank. The failure of the bank does not, of course, destroy the right of the respondent to follow and recover its pro rata share of the assets of the bank, said right being expressly contracted for in said Indemnity Agreement.

> "It frequently happens that on the creation of the suretyship relation the principal enters into an express contract with the surety, whereby he undertakes to indemnify him for any loss that he may sustain as a result thereof." 21 R. C. L. 1097.

> "On payment of the principal's debt, the surety becomes a simple contract creditor of the principal." 21 R. C. L. 1097.

We have not been able to find a case holding that a surety cannot recover on an Indemnity Agreement. On the contrary, the courts hold that it is competent for parties to make a contract, agreeing on liability on the part of the principal, even before the surety has actually made payment of the debt. Pingree on Surety and Guaranty, 2nd Ed. Sec. 182. Cooper v. Barker, 57 So. 472.

A fortiori it is competent for them to agree on liability of principal to the surety after payment.

In the absence of an express contract of indemnity, the principal is bound, but the parties may, however, by express contract, provide for enlarged indemnity.

> "It is competent for the principal, by express contract with the surety, to enlarge, restrict or entirely take away the right of indemnity." Childs Suretyship and Guaranty, p. 294.

Many cases might be cited illustrating the principle that the implied indemnity from the principal to the surety may be enlarged upon by express contract. For instance, agreements in which the principal agrees to reimburse the surety for all costs, counsel fees and expenses which the surety may incur by reason of the execution of the bond; and also agreements wherein the surety, as in the case at bar, is given the right to follow and recover from the assets of the principal any sums of money which it may have been obliged to pay out under the obligation assumed by it.

The authorities uniformly hold that it is within the power of a bank to secure its depositors for deposits made with it.

> "Giving a bond to secure funds deposited with them is within the power of a national bank, and sureties on such bonds are liable." Michie on Banking, Vol. 3, p. 2026.

See also State v. First National Bank, 88 Fed. 947.

A national bank may secure its depositors by bond or any other lawful means. Inter-State National Bank v. Ferguson, Treasurer, 30 Pac. 237, 7 C. J. 817.

In the case of Gronbald v. Federal Union Surety Company, 212 Fed. 908, the court, speaking through Judge Sanborn, upheld and enforced an Indemnity Agreement given by and in behalf of a bank to the surety company as consideration and inducement to the surety company for the execution of its depository bond to the state.

In the case of American Surety Company v. Thurber, 21 N. Y. St. Rep. 459, it was held that the extent of the principal's liability under such a contract of indemnity, depends on the wording thereof, and the agreement is to be

construed to give effect to each and every part thereof, according to the intentions of the parties at the time.

In the case of Kilpatrick v. U. S. F. & G. Co., 228 Fed. 591, it is stated:

> "It is a fundamental principle of the law of suretyship, recognized alike under the decisions of the Alabama Courts and the Federal Courts, that the indebtedness of a bankrupt principal to his surety, who subsequently discharges the obligation in whole or in part, takes effect from the date the surety executed the instrument which binds him; and that in the event the surety discharges the debt of the principal, after the principal's adjudication as a bankrupt, his surety is indemnified, in that he has a proveable and likewise a dischargeable debt which had its origin prior to the adjudication. In Re Stout, 109 Fed. 794; Livingston v. Hieneman, 120 Fed. 786; Remington on Bankruptcy, Sec. 611 and 614; Loveland on Bankruptcy, Sec. 304, 329, 330; In Re O'Donnel, 131 Fed. 150."

> "It is competent for the principal and surety to enter into whatever express contract they will touching the reimbursement of the latter. The surety may contract for more than strict indemnity, or may bargain away his right to indemnity entirely, though stipulations claimed to have the latter effect will be strictly construed in his favor." Spencer on Suretyship, p. 159.

> "Unlike the right or equity of subrogation, the right to indemnity becomes enforceable whenever the surety has paid any part of the debt for which he is liable." Spencer on Suretyship, p. 162.

That the surety has the right to determine the conditions upon which it undertook the suretyship and made this contract of indemnity, seems to be beyond question. The contract of indemnity on the part of the bank is as valid and binding as the bond was on the part of the surety company, or any other obligation which the bank might have made prior to the receivership. Respondent's claim herein is independent of the claim of the county or the treasurer or any other depositor, and is a valid claim separate and distinct from the claim of the county or any other depositor.

It is a separate and distinct obligation entered into between the bank and the respondent, for a valuable consideration and without which the bank would not have had the county's deposit. It is an independent contract and liability and responsibility.

The general creditors of the bank became such with full knowledge that it was a depository of public funds and as such required by law to furnish a depository bond. They are charged with knowledge of the law, Sec. 4500 C. L. Utah, 1917, that in the event the surety should suffer a loss by reason of its execution of such a depository bond, it would be entitled to indemnity against the bank and entitled to the same rights as each and every other creditor by reason of such contract of indemnity. Surely they cannot be heard to complain, and especially the treasurer and the American Surety Company herein, by reason of the allowance and payment of respondent's claim herein, based upon said contract, of which they must be held to have notice. Treasurer Groesbeck himself was required to execute an Indemnity Agreement to the American Surety Company in order to secure his official bond, under which Indemnity Agreement said surety company was given the right by subrogation to succeed to his claims against the bank. (R. 125-131). The treasurer did not have to make his deposit under the depository bonds unless he wanted to.

Therefore, both Treasurer Groesbeck and the American Surety Company knew of the practice of surety companies to take such Indemnity Agreements and that the bank was required to execute an Indemnity Agreement to this respondent to secure its depository bond, and that such an agreement would become an abligation binding upon the bank in the event of its failure. The deposits were all made with the knowledge of a possibility of insolvency and a failure to be able to pay in full by the bank, and we see no reason why the creditors, including this respondent, do not stand on the same footing.

It is contended by the petitioners that the allowance of respondent's claim would take from the American. In the first place, we do not think that this is a defense that may be made by the receiver; but suppose the allowance of our claim should take from the American, yet so it would from every other creditor of the bank, just as any claim on any obligation entered into by the bank would do.

> "It may be stated generally that, in order that any matter may be set up as a defense to an action on a contract of indemnity, it must be germane to the cause of action pleaded, and present a legal reason why the indemnitee should not recover." 31 C. J. 459.

The claim herein sued upon is a valid and enforceable claim and the Court cannot make a new contract for the parties nor modify the one made, but must enforce the contract as made.

Certainly general depositors of the bank occupy no position other than that of common creditors. A depositor has no greater claim upon the assets of the bank than any other creditor of the bank.

> "Since general depositors are merely general creditors, they are only entitled to share pro rata with other general creditors in the distribution of the funds of an insolvent bank." Michie on Banking, Vol. 1, Sec. 80, p. 603.

Numerous authorities might be cited to the effect that a depositor stands on no better footing than any other creditor of the bank in the distribution of its assets. If the National is not a creditor of the bank, then what position does it occupy by reason of its Indemnity Agreement?

In Swartz v. Siegal, 117 Fed. 13, at page 17, the Court, speaking through Judge Sanborn, said:

> "One who loans his credit to another is as much his creditor as one who loans his money to him. A creditor is 'one who has the right to require the fulfillment of an obligation or contract. Bouv. Law Dict. page 1435.' "

The respondent National Surety Company loaned its credit to the bank in order that the bank might secure the deposit of public funds which the latter was desirous of receiving under the provisions of Section 4500 Comp. Laws of Utah, 1917, authorizing the deposit of public funds with banks, and was willing to furnish a depository bond as well as to pay interest upon the money so deposited, as provided by the provisions of that act, and the receipt of this deposit was a distinct benefit to the bank; and to secure the loan

of the credit of the National Surety Company, it executed to the latter the Indemnity Agreement herein sued upon.

The Indemnity Agreement executed by the bank is recognized by all the authorities to be a valid and enforcible agreement, and the National's rights thereunder are just as great in case of the insolvency of the bank as had the bank remained solvent.

> "The contract gives the surety rights beyond those implied in law. Such a contract is legal and may be the basis of a recovery." In Re Dailey, 19 Fed. (2d) 95.

In fact, if the bank were solvent there would be no occasion to rely upon the specific terms of the Indemnity Agreement giving this respondent the right to follow and recover out of the bank's assets for any loss that it might sustain.

The assets of the bank were increased by $643,000 odd dollars by reason of the deposit of public funds, same being more than one-third of all of the deposits in the bank, the bank had the benefit of such deposit, and the receiver would now repudiate the contract under which such funds were loaned to the bank. The bank itself, had it remained solvent, could not have refused reimbursement to this respondent, nor can the receiver, inasmuch as the rights of this respondent are not diminished or varied by reason of his appointment. See Michie on Banking, Vol. 1, Sec. 77, p. 542.

The surety has its remedy against the principal and such action is in its own right and as a result of its contractual relation, as distinguished from any right conventionally transferred from the creditor whom it has paid. It is true that the surety may be subrogated to all the liens, privileges and other incidents of the claims of the creditors, but this is a legal consequence which cannot affect the individual cause of action which the surety has directly against its principal by reason of express contract.

By reason of said Indemnity Agreement and the payment by the respondent thereunder of the sum of $125,000.00 in behalf of said bank, it became a creditor of said bank in said amount. By the specific terms of said Indemnity Agreement the respondent acquired the right to look to the property of the bank and to follow and recover the same in the hands of the receiver, said Indemnity Agreement

being taken for the specific purpose of protecting the respondent, particularly in the event of the failure of the bank. The promise and agreement of the bank can be fulfilled only by the allowance of respondent's claim against the general assets of the bank and the direction to the receiver to pay to the respondent dividends thereon. The respondent has performed to the fullest its every obligation, a duty which it assumed only upon the express agreement of the bank to indemnify, and the Court below has required the bank to fulfill its coincident obligations to the respondent..

CONCLUSION.

It is apparent that the brief of petitioners is an extensive re-argument of the questions of fact and law presented to the Circuit Court of Appeals. It is also obvious that in order to attempt to escape the well-settled principle that a surety has a right of action for reimbursement against its principal, the petitioners were obliged to plead the technical defense of res judicata, and to introduce in evidence a great mass of testimony from the records and brief in the other case. This of necessity involves a consideration of a question of fact, as well as one of law, and both questions were determined against them. This Court has repeatedly held that certiorari will not issue to review what are primarily questions of evidence or fact.

The case involved a construction of local statutes and decisions construing the same, and a consideration of the form and interpretation of certain contracts. The decision is not merely in accord with the weight of authority, but is decided upon well-settled principles of suretyship law. Petitioners have completely failed in their effort to show that there is a conflict of authority between the Circuit Courts of Appeal, the cases cited by them being readily distinguishable from the instant case.

It seems altogether unnecessary for this Court to instruct the Comptroller of the Currency that a contract of indemnity, such as herein sued upon, creates an obligation on the part of the bank. This principle has been sustained by the Federal Courts on so many different occasions that it cannot be said that there is any conflict of authority in any of the cases where the matter has been presented

squarely to the Court. It is also apparent that no question in this case involves the interpretation of the National Banking Act and that no question of peculiar gravity or general importance is involved, either as a matter of fact or as a matter of law.

It is respectfully submitted that the grounds urged by petitioners for the petition do not exist, and that this case is in no sense an extraordinary one, justifying the interposition of this Court. As was stated by this Court in Magnum Import Company vs. De Spoturno Coty, Supra, jurisdiction in certiorari was not conferred, "merely to give a defeated party in the Circuit Court of Appeals another hearing."

Respectfully submitted,

RAY VAN COTT

Attorney for National Surety Company, Respondent.

ARTHUR E. MORETON

Of Counsel.

MAR 6 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 424.

EDWARD E. JENKINS, RECEIVER OF THE NATIONAL CITY BANK OF SALT LAKE CITY, UTAH, ET AL.,
Petitioners,

vs.

THE NATIONAL SURETY COMPANY,
Respondent.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

A. E. MORETON,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1927.

No. 424.

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Petitioners,

vs.

THE NATIONAL SURETY COMPANY,
Respondent.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

OPINIONS OF COURTS BELOW.

The decision of the court below, the Circuit Court of Appeals of the Eighth Circuit, appears at page 231 of the Record herein, and is reported in 18 Fed. (2d) 707. That decision, dated March 28, 1927, was by a unanimous court. A rehearing was denied on June

14, 1927 (R. 257). The decree of the District Court for the District of Utah in this case appears at page 51 of the Record. The opinion of the Circuit Court of Appeals deals mainly with the defense of *res judicata.* The decision on the merits is made to rest upon the decision of the same court in the case of U. S. Fidelity and Guaranty Company vs. Centropolis Bank of Kansas City, 17 Fed. (2d) 913, which case was argued before that court upon the same date and before the same judges as this case.

The decree in the case of Salt Lake County, American Surety Company and E. J. Groesbeck, Treasurer, vs. Edward E. Jenkins, Receiver, claimed by the petitioners to be *res judicata* of the issues here involved, appears at page 107 of the Record, and the opinion of the Circuit Court of Appeals of the Eighth Circuit, 5 Fed. (2d) 34, affirming that decree, appears at page 110 of the Record.

JURISDICTION.

A writ of certiorari was granted by this Court on October 31, 1927, upon the request of the petitioners, and the Comptroller of the Currency who appeared as *amicus curiae,* jurisdiction of the court being invoked under Section 240 (A) of the Judicial Code as amended by the act of February 13, 1925 (C. 229; 43 Stat. 936, 938).

STATEMENT OF THE CASE.

The respondent, the National Surety Company, brought this action against Edward E. Jenkins as Receiver of the National City Bank of Salt Lake City, Utah, to compel the allowance of its claim upon an indemnity agreement, entered into by the said bank and

the National Surety Company, and the payment of dividends thereon.

The complaint herein (R. 1) alleges that on the 3rd of January, 1921, the respondent, National Surety Company, upon the application of the said bank, executed and delivered to Edward J. Groesbeck, as Treasurer of Salt Lake County, Utah, its certain bond (R. 12) in the sum of $125,000.00, guaranteeing the repayment of such sums as the said Treasurer might deposit in said bank up to the penalty of the bond; that, as an inducement to and consideration for the execution of said bond, the said bank made and executed and delivered to the respondent a certain indemnity agreement (R. 6-11) wherein it agreed to indemnify the respondent and save it harmless from all claims and demands whatsoever on account of its execution of the said bond, and to pay over, reimburse and make good to the respondent all sums of money which it might be obliged to pay by reason of having executed said bond; that in said indemnity agreement the respondent was given the right to look to and rely upon the property of the bank and its income and earnings, and to follow and recover out of the bank's property then belonging to it, or which might thereafter belong to it, and the income and earnings thereof, for anything that might become due to the respondent under said indemnity agreement.

The complaint further alleges that on the 17th day of January, 1922, the bank failed and this respondent, on June 17, 1922, paid to Salt Lake County and Edward J. Groesbeck, its Treasurer, the full sum of $125,000.00; that by reason thereof the Receiver of said bank is indebted to the respondent in the sum of $120,000.00 ($5,000.00 of its claim having been assigned

to the American Indemnity Company); that, prior to the commencement of this action, the plaintiff on April 10, 1925, duly presented to and filed with the defendant Receiver its verified claim for said sum of $120,000.00 by virtue of said indemnity agreement, and demanded that the Receiver approve its claim as a creditor of said bank in the said amount, but that this the defendant had refused and still refuses to do. (R. 5.) A copy of the said claim is printed in the Record (R. 13-17) as a part of the complaint. The said complaint concludes with a prayer that the respondent's claim based upon said written indemnity agreement be allowed and approved in the sum of $120,000.00 and that dividends be paid to it upon the same basis as other common creditors of the bank. (R. 6.)

The Receiver answered and prayed that Treasurer Groesbeck and the American Surety Company, who was surety on an official bond given by the said Groesbeck to Salt Lake County, be required to interplead in the action and set up their claims, if any, "to the assets of the National City Bank of Salt Lake City, Utah, now held and possessed by defendant as Receiver." (R. 28.) The court ordered that Groesbeck and the American Surety Company appear in the action and set forth their claims, if any, "to the property, subject of said action." (R. 29.) Thereupon Groesbeck and the American Surety Company filed their answer (R. 30). The answer of the Receiver, as well as that of the American Surety Company and Groesbeck, set up the decree in the case of Salt Lake County, *et al.* vs. Jenkins, *et al.*, 5 Fed. (2d) 34, and alleged that, under the doctrine of *res judicata*, the National Surety Company was estopped from asserting its claim under its said contract of indemnity and

from receiving dividends thereon out of the assets of the insolvent bank (R. 25, 33). These answers also alleged that the National was not entitled to participate in such dividends until the American had been paid in full under its right of subrogation to the claim of Salt Lake County and Treasurer Groesbeck.

In support of its complaint the respondent proved the execution of its indemnity agreement and of its depository bond; that the said bond was given pursuant to Section 4500 of the Compiled Laws of Utah, 1917; that Groesbeck, as Treasurer, deposited the funds in the said National City Bank; that the respondent on June 17, 1922, paid the penalty of its bond in the sum of $125,000.00; and that it had not been repaid any part thereof. (R. 65.) This made a *prima facie* case for the respondent. In support of this contention that the cause of action herein sued upon was *re judicata*, petitioners introduced in evidence the pleadings and decree and extracts from the record and briefs in the earlier case. In rebuttal the respondent in turn offered other extracts from the said record and briefs.

The decree of the trial court in this action (R. 52) approved and allowed respondent's claim, but subject to the conditions, limitations and qualifications (1) that the respondent should recover nothing from the bank until and after such time as the claims of the American Surety Company, growing out of its fidelity bond written for Treasurer Groesbeck, had been paid in full as provided in the decree in the earlier case; (2) that the allowance of the respondent's claim should not affect the existing basis of computing and paying dividends as established by the Receiver upon claims theretofore approved; (3) that the Receiver should not set up on his books the claim of respondent which

had been "approved and allowed" nor set aside any funds or assets for the payment of dividends thereon. The right of the respondent to share in dividends at the time of the decree was denied, and the decree recited that respondent's right, on account of its indemnity agreement, to participate in the assets of the bank, as against the defendant Receiver and other creditors of the bank, after the payment of the American Surety Company in full, was not determined.

The Case Transferred From the Law to the Equity Side of the Court.

This case was started as an action at law. At the conclusion of the trial the court, on its own motion, transferred the case from the law to the equity side of the court, with an exception to plaintiff as appears from the following:

> "Plaintiff's claim as such is not really denied by the answers in the case. It is admitted that you paid the amount alleged, and that being admitted, it follows that your claim is an allowable claim to be paid under conditions out of the assets of the bank. It should be paid by the Receiver if any funds are ever available. Defendants set up as a defense that this matter is *res judicata* and that plaintiff, as the result of the situation of the parties, is not entitled to share in the funds. It seems to me these are equitable matters properly triable in a court of equity and I shall so treat it and order it tried upon the equity side of the court, and plaintiff may have on exception." (R. 212.)

For brevity, Edward E. Jenkins as Receiver will be hereinafter referred to as "Receiver"; E. J. Groesbeck, Treasurer, will be referred to as "Groesbeck"; the National Surety Company as "the National"; the

American Surety Company as "the American" and the National City Bank as "the bank."

QUESTIONS IN THE COURT BELOW.

The essential questions for determination by the Circuit Court of Appeals were:

(1) Whether the present action is *res judicata* by reason of the decree (R. 107) in the earlier case hereinbefore referred to; and

(2) Whether respondent has a right to prove its claim growing out of its contract of indemnity against the Receiver and to be paid dividends thereon as a common creditor out of the assets of the failed bank.

The Circuit Court held that the decree in the earlier case did not make the subject-matter of this action *res judicata*, and that respondent by reason of its indemnity agreement and payment on its bond is a creditor of the bank and entitled to have its claim allowed and to participate thereon in dividends from the assets of the bank.

The question here is whether the Circuit Court of Appeals erred in so holding.

BRIEF OF THE ARGUMENT.

I.

RES JUDICATA.

(a) The rule established by this court.

(b) The distinction between subrogation and indemnity.

(c) What was litigated and decided in the earlier action.

II.

THE RESPONDENT'S RIGHT TO INDEMNITY.

(a) Statement of the right.

(b) Cases supporting respondent.

(c) Cases relied upon by petitioners.

III.

REPLY TO OPPOSING ARGUMENTS:

(a) That the National under its contract is not entitled to participate in the assets of the bank in competition with Groesbeck and other general creditors before Groesbeck has been paid in full.

(b) That the allowance of dividends to the National would violate the principle of equality and ratable distribution established by the National Banking Act.

(c) That the court below erroneously applied the doctrine of relation back.

(d) That there is conflict in the two decisions of the circuit court of appeals involving the same subject-matter.

ARGUMENT.

I.

RES JUDICATA.

(a) The Rule Established by This Court.

The rule of law which must be followed in determining whether the subject-matter of this action was *res judicata,* by reason of the decree of the District Court of Utah (R. 107), as affirmed by the Circuit Court of Appeals for the Eighth Circuit, in the case of Salt Lake County, E. J. Groesbeck, Treasurer, and Amer-

ican Surety Co. vs. Edward E. Jenkins, Receiver of the National City Bank of Salt Lake City, Utah, Defendant, and vs. National Surety Co., American Indemnity Co., and Massachusetts Bonding and Surety Co., Interpleaded Defendants, 5 Fed. (2d) 34, was laid down by this Court in Cromwell vs. Sac County, 94 U. S. 351, 24 L. ed. 195, where it was said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

By way of explanation of the rule thus announced the court commented as follows:

> "Thus, for example: a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are

> concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever."

But that rule does not apply where the second action between the same parties is upon a different claim or demand, for the court said:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined." * * *
>
> "On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."

Shortly after the rule in Cromwell v. Sac County, *supra,* was announced, this Court again had occasion to review the doctrine of *res judicata.* In Davis v. Brown, 94 U. S. 423, 24 L. ed. 204, 207, the Court said:

"In taking this position, counsel have confounded the operation of a judgment upon the demand involved in the action, in which the judgment was rendered, with its operation as an estoppel in another action between the parties upon a different demand. So far as the demand involved in the action is concerned, the judgment has closed all controversy; its validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it; and that is all that the language means which is quoted by counsel from opinions in adjudged cases, in seeming consonance with his position."

"When a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action."

In Boise Development Company vs. Boise City, 30 Ida. 675, 167 Pac. 1032, the court said:

"When a party, acting upon a mistaken theory as to his legal rights, brings his action, and is defeated by reason thereof, and afterwards renews the litigation, basing his claim upon a correct theory, the former judgment is no bar to the second action. Black on Judgments, Sec. 733; Hughes v. United States, 4 Wall. 232, 18 L. ed. 303; Freeman on Judgments (4th Ed.) Sec. 260; 23 Cyc. 1226; Keane v. Pittsburg, etc., Co. 17 Idaho 179-191, 105 Pac. 60; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Lockett v. Lindsay, 1 Idaho 324. At most the former case was 'merely illusory and supposititious, and hence it cannot

> be considered as identical, in any just sense of the term, with the true cause of action correctly set up and supported by a right theory of the facts.' Black on Judgments, Sec. 733."

In Barnsdall v. Waltemeyer (C. C. A. 8), 142 Fed. 415, it was held that a suit to rescind a contract for misrepresentation and default of performance, which was dismissed on its merits, is no defense to an action to enforce the contract, the court saying:

> "But the fatuous choice of a fancied remedy that never existed, and its futile pursuit until the court adjudges that it never had existence is no defense to an action to enforce an actual remedy inconsistent with that first invoked through mistake."

The parties in the case at bar and in the earlier action are nominally the same, but it is clear that the claim or demand in this action is wholly different from that involved in the first action. Here the claim is based upon a contract of indemnity; there the claim was based upon the right of subrogation to dividends declared and to be declared upon a particular deposit. Here the action is at law to enforce a written contract; there the action was in equity to obtain the benefit of an equitable remedy. This distinction will be further noticed.

(b) The Distinction Between Subrogation and Indemnity.

The distinction between subrogation and indemnity goes to the very heart of this action and must be kept in mind throughout the consideration of the case, not alone on its merits, but as well on the question of *res*

judicata. "The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relation between the parties." *Memphis etc., R. R. Co., v. Dow et al.,* 120 U. S. 287, 30 L. ed. 595, 601. It is a device adopted or invented by equity to compel the ultimate discharge of a debt or obligation by him who in good conscience ought to pay it; it is the machinery by which the equity of one is worked out through the legal rights of another. *25 Ruling Case Law, 1312.* Indemnity, on the other hand, springs only from a contract express or implied (*In re Freeman & Co.,* 1 Fed. (2d) 430; *Northern Finance Co. v. Byrnes,* 5 Fed. (2d) 11) and may be defined as an obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit. *31 C. J. 419.*

The right of subrogation can be established only in a court of equity, the right of a surety who has paid the debt to subrogation standing, not upon contract, but upon the principles of natural justice. *Craythorne v. Swinbourne,* 14 Ves. Jr. 160; *Fishback v. Weaver,* 34 Ark. 569; *Memphis & L. R. R. Co. v. Dow,* 120 U. S. 287, 30 L. ed. 595; *Crisfield v. State,* 55 Md. 192; whereas, on payment of the principal debt, the surety becomes a simple contract creditor of the principal and is entitled to maintain the common-law action of *indebitatus assumpsit* for money laid out and expended. *Ward v. Henry,* 5 Conn. 595; 32 Cyc. p. 261.

A subrogee takes only such rights as belong to his predecessor in interest and takes them subject to all limitations, burdens and infirmities which attach to them in his predecessor's hands; while the rights of

the indemnitee are determined by the conditions and terms of his contract of indemnity.

> "It is competent for the principal and surety to enter into whatever express contract they will touching the reimbursement of the latter. The surety may contract for more than strict indemnity, or may bargain away his right to indemnity entirely, though stipulations claimed to have the latter effect will be strictly construed in his favor." Spencer on Suretyship, p. 159.

The surety's right to subrogation as against the debtor does not arise until and "unless he pays the whole debt or it is otherwise satisfied" (*United States vs. National Surety Co.*, 254 U. S. 73, 65 L. ed. 143; *Mellette Farmers Elevator Co. vs. H. Poehler Co.*, 18 Fed. (2d) 430, 431); whereas under a contract of indemnity the surety can proceed against the principal even though he has paid only a part of the debt.

> "If a surety pays anything on the debt, he is instantly vested with a right of action for his reimbursement against the principal, and if he pays all, he is subrogated to the creditor's position and securities." In re Kimbrough-Veasy Co., 292 Fed. 757.
>
> "Unlike the right or equity of subrogation, the right to indemnity becomes enforceable whenever the surety has paid any part of the debt for which he is liable." Spencer on Suretyship, p. 162.

It is to be noted that throughout this case the petitioners have wholly failed to take account of the basic distinction between subrogation and indemnity. They contend, because the court in the first case denied to respondent a prior right of subrogation to the divi-

dends to be paid to Groesbeck upon the deposit of the public funds of Salt Lake County, that such decision necessarily decided and concluded the rights of the respondent to receive dividends from the assets of the bank in its own right, based solely and directly upon the indemnity agreement executed by the bank to the respondent as the inducement and consideration for the execution of its depository bond. The denial in the earlier action of the respondent's right to be presently subrogated to dividends upon the County's deposit is not, of course, incompatible with the allowance in this action of its claim to indemnity; and the Circuit Court of Appeals so held.

Petitioner's confusion in failing to distinguish between subrogation and indemnity is well illustrated by the following extract from p. 53 of their supporting brief for a writ of certiorari in this case:

> "The limited rights which the National has in this case *spring from payment* * * *. The same reasons and the same motives have operated in the law to raise up and confer upon the surety the rights of indemnity and the rights of subrogation. Both rights are *conferred* upon the surety by *operation of law.* * * * A situation which has already *required the court to withhold subrogation must of necessity require it to withhold indemnity.*"

The courts themselves have not always been careful to distinguish between subrogation and indemnity, and some confusion and inapt expressions in the decisions have resulted from that fact. This situation was commented upon in Mellette Farmers Elevator Co. vs. H. Poehler Co., 18 Fed. (2d) 430, 431, where the court said:

"The reasons for the diversity of opinion arising out of situations such as this appear to be the failure to distinguish between an express or implied contract of indemnity and the right of subrogation, together with the desire to postpone the reimbursement of a paid surety until all obligees have been paid in full. However natural that desire may be, it should not be permitted to override well-established legal principles. If surety bonds are adequate to meet the needs of a situation, the obligees will be paid in full, and the surety left to reimburse itself from the assets of the principal so far as possible. Where such bonds are inadequate to meet a situation, there seems to be no logical reason for excluding a surety from participation, as a general creditor, after it has paid the full loss indemnified against. The cases which appear to support this conclusion are Title Guaranty & Surety Co. v. Shattuck (C. C. A.) 224 F. 401; Cole v. Myers, 100 Neb. 480, 160 N. W. 894; Am. Surety Co. of N. Y. v. Nat. Bank of Barnesville *et al.* (D. C.) 17 F. (2d) 942; U. S. F. & G. Co. v. Carnegie Trust Co., 177 App. Div. 176, 164 N. Y. S. 92; Id., 221 N. Y. 646, 117 N. E. 1086; In the Matter of Dailey & Ivins, Bankrupts, 19 Fed. (2d) 95; U. S. F. & G. Co. v. Centropolis Bank of Kansas City *et al.* (C. C. A.) 17 F. (2d) 913."

In Clark's Principles of Equity (1924) p. 605, it is said:

"Subrogation is, in most cases, rather an additional remedy than an additional right, and may exist concurrently with, and as a further security to, the right to a simple action for reimbursement or exoneration. The fact that a party entitled to reimbursement and also to subrogation is entitled to two distinct remedies, *seems often to be overlooked, to the confusion of both doctrines.*"

(c) What was Litigated and Decided in the Earlier Action.

The claim or demand in this case being clearly different from that in the earlier action, it remains to inquire just what was litigated and determined in the first case.

When the bank failed, January 17, 1922, Groesbeck, as Treasurer of Salt Lake County, had on deposit therein the sum of $643,094.29 (R. 67). To secure this deposit he had taken three depository bonds, one from the respondent in the sum of $125,000.00, one from the Fidelity & Deposit Company of Maryland in the sum of $75,000.00 (R. 67), and one from the Massachusetts Bonding & Insurance Company in the sum of $25,000.00. In addition he had accepted, as collateral, bonds of the Crystal Lake Farm Lands Company of the par value of $360,000.00. Each surety paid to Groesbeck and the County the amount of its depository bond. The American as surety on the official bond of Groesbeck had also paid the County $200,000.00, the penalty of its fidelity bond. These payments, added to the dividends paid by the Receiver, had reduced the unpaid balance of the County's deposit to $47,666.01. When the complaint in the original action was filed, the Receiver had on hand the sum of $56,809.42, apportioned as a further dividend on the County's deposit. This was $9,143.41 in excess of the amount needed to make the County whole, and the question arose as to whom this excess should be paid.

In this situation Salt Lake County, Groesbeck as its Treasurer, and the American, filed in the District Court of United States, for the District of Utah, on March 10, 1924, a complaint against the Receiver, in

which the facts as above outlined were set up and in which it was alleged:

> "That when said Salt Lake County has received said * * * $47,666.01 and thereby has been fully paid and made whole on account of the moneys so deposited in said National City Bank of Salt Lake City, Utah, the American Surety Company of New York will be entitled, by operation of law, to be *subrogated to the rights of the County and the County Treasurer, as against said National City Bank of Salt Lake City, Utah,* and its said Receiver, by reason of the County moneys deposited in said bank, and will be entitled to payment to it of *all moneys and dividends lawfully payable by said Receiver as dividends on account of said deposit until said American Surety Company of New York has been paid.*" (R. 76)

The complaint prayed that the Receiver be ordered to pay Salt Lake County and Groesbeck as Treasurer $47,666.01 of the dividend of $56,809.42 apportioned to the County's deposit in the said bank, and that the remainder of said dividend, $9,143.41, be paid to the American. (R. 77)

It was further prayed that "all further dividends accruing in the hands of the defendant *by reason of the deposit of County funds in said bank*" be paid to the American until it had been repaid in full for the losses sustained by it as surety upon the official bond of Groesbeck. (R. 77)

The complaint tendered no issue with reference to the bonds of the Crystal Lake Farm Lands Company which Groesbeck had held as collateral for the County's deposit. No decree was prayed with reference thereto (R. 77), although Exhibit A attached to the complaint and being an assignment to the American by Groes-

beck, with the approval of the County, of all rights of Groesbeck as Treasurer of the County against the bank, recited that:

> "And said E. J. Groesbeck as County Treasurer of Salt Lake County, and said Salt Lake County, do hereby assign, transfer and set over unto said American Surety Company of New York all its rights and claims in and to the $360,000.00 par value of the bonds of the Crystal Lake Farms Company held as security for the payment of said moneys represented by said deposit." (R. 79, 80).

The Receiver answered and admitted generally the allegations of the complaint. He alleged that upon the payment by the Fidelity & Deposit Company of Maryland of the penalty of its bond, in the sum of $75,000.00, he had, by reason of a special provision contained in said bond, set up a claim in favor of that company in the amount of $75,000.00 and had reduced the claim of the County to that extent, that is to say, from $643,-094.29 to $568,094.29. (R. 81) The Receiver admitted having in his possession for payment a dividend of 10 per cent declared on the County's remaining claim for $568,094.29, which dividend the Receiver claimed he was "ready and willing to pay over to *whomsoever is lawfully entitled thereto.*" (R. 82)

Because he did not know to whom this dividend should be paid and did not know to whom other dividends to be declared in the future on the deposit of Salt Lake County should be paid, the Receiver prayed the court for an order requiring the National and the Massachusetts Bonding & Insurance Company and the American Indemnity Company to interplead together "and set forth and litigate their rights among themselves *concerning said dividend of $56,809.42*" * * *,

and "any future dividends which may accrue and come into the possession of this defendant *by reason of the deposit by Salt Lake County of said funds* in the National City Bank." (R. 85)

It is thus seen that the complaint and the answer of the Receiver placed in issue only the right, after the County had been paid in full, to participate in dividends declared and to be declared *on the deposit of the County in the said bank.* This was *subrogation* to the rights of the County and did not in any way involve the rights of the National to reimbursement, growing out of its indemnity agreement.

The answer of the National, the respondent here, on interpleader, set out that it appeared:

> "In accordance with the order of interpleader made herein by the above-entitled court, requiring the National Surety Company to set forth *its rights to said sum of $56,809.42.*" (R. 87)

The answer of the National set out that:

> "By reason of its payment of said sum as aforesaid to Salt Lake County, it became by operation of law and is entitled to be *subrogated* to the amount of such payment *to the rights and claims of* Salt Lake County, and E. J. Groesbeck, its Treasurer, against the said National City Bank and this defendant as its Receiver. * * *" (R. 89)

and that the National is:

> "Entitled to subrogation in said amount ($125,000.00) as against the Receiver of its principal (the bank); and that the American Surety Company is entitled to subrogation and reimbursement only as against its principal (Groesbeck)." (R. 91)

It is true that the respondent, in its answer on interpleader, alleged that as a consideration for the issuance of its depository bond in the sum of $125,000.00, the bank had promised to indemnify and reimburse the National for any loss which it might sustain by reason of its execution of said bond, and that the National had "duly presented its claim in said amount arising out of said bond to the said defendant Receiver." (R. 92.)

The respondent prayed (Par. 2, p. 92) that it be—

> "Ordered, adjudged and decred that the National Surety Company is entitled by *subrogation* and operation of law to its pro rata share of said $9,143.41 of the *dividends now declared* and held by said defendant Receiver, together with its pro rata share of all dividends declared by the defendant Receiver *by reason of the deposit of said public funds in said bank*, together with its pro rata share of said Crystal Lake Farm Lands Company's bonds." (R. 92)

It further prayed that its claim against the Receiver in the sum of $125,000.00 arising out of the indemnity agreement be allowed and approved and the defendant Receiver ordered to pay dividends thereon; but the allegations of the pleadings and that part of the prayer relating to the indemnity agreement, apart from their relation to the right of subrogation, amounted to nothing more than a futile attempt to raise a new issue which could not be properly litigated and determined in that case. The National had been brought, on interpleader, into a suit in equity for the single purpose of setting up and litigating its right to be subrogated to dividends declared, or to be declared, on the deposit of public funds belonging to the County. Having been

brought in for this single purpose, it could not properly attempt to litigate an independent legal claim against the Receiver for reimbursement growing out of the bank's agreement to indemnify and reimburse it for such losses as it might sustain by reason of the execution of its bonds. The subject-matter of the suit was the right of subrogation to dividends on a particular deposit,—not the right of a claimant against the bank to participate as a common creditor in dividends generally. In a suit in equity for subrogation, the National attempted to litigate the subject-matter of a distinct, separate and independent action at law. This it could not do. Its allegations in that behalf had no proper place in its answer and were clearly subject to a motion to strike. The situation would be similar if the respondent had been interpleaded in a suit by Groesbeck and the County against the Receiver to quiet title to land and had attempted in its answer to set up as against the Receiver an action in its favor on a promissory note given by the bank. The attempt to litigate in the first case the respondent's right to indemnity was obnoxious to that provision of Equity Rule 37 reading as follows:

> "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

See Hutchinson v. Philadelphia & G. S. S. Co., 216 Fed. 795.

It was considerations such as these that led the Circuit Court of Appeals in this case to say that:

> "Such claim was not a proper subject for litigation in the former suit."

and that

> "Since it is a matter which could not properly have been litigated and was not actually litigated, and was not necessarily determined by the decree in the former suit, it is not concluded by that decree although it was put in issue by the pleadings." (R. 238)

It is doubtful whether this new matter was "put in issue by the pleadings" except in so far as this followed from the allegations in the answer of the respondent on interpleader to which reference has been made. The Receiver against whom alone these allegations were directed, and could properly be directed, made no reply to the answer in interpleader of the respondent. The American answered the respondent, but so far as the allegations in question are concerned merely stated as follows:

> "Answering paragraphs 12 and 13 of said complaint in intervention, this plaintiff alleges that it has no knowledge or information sufficient to form a belief as to the truthfulness of the allegations therein contained, and therefore and upon that ground denies the same." (R. 97)

It can hardly be said that this was sufficient to make an issue of the right of the respondent to dividends as a common creditor based upon its indemnity agreement.

But however that may be, the trial court in the first case apparently did not consider that the right of the respondent under its indemnity agreement was involved, for in its decree it said nothing whatever about it. It awarded $47,666.01 of the dividend then avail-

able to Salt Lake County, directed the payment of the balance, $9,143.41, to the American, and *subrogated* that company:

> "To all *dividends* that may become payable *on the claim in the sum of $568,094.29 of said Edward J. Groesbeck as Treasurer of Salt Lake County against said National City Bank,* and * * * to the bonds of Crystal Lake Lands Company of the par value of $360,000.00, held by said Edward J. Groesbeck *as collateral security for the deposit of said moneys in said National City Bank.* * * *" (R. 108)

It was further decreed that after the American had been paid in full, the National, the American Indemnity Company and the Massachusetts Bonding & Insurance Company—

> "Shall participate pro rata in all further dividends declared and payable on said claim and/or all balance of proceeds from the sale or other disposition of said Crystal Lake Farm Lands Company bonds, until the amount of the claims of said interpleaded defendants, as shown by their complaints in intervention, are paid in full, and any balance thereafter remaining shall belong to the Receiver of said National City Bank." (R. 109)

It thus appears that while the National was decreed to be entitled to subrogation, in its turn, to the claims of Salt Lake County and Groesbeck, its Treasurer, against the bank, nothing whatever was decided or decreed concerning its claim based upon the indemnity agreement.

Attorneys for the American admitted that they had prepared the decree as signed by the trial court (R.

171) and it seems evident that if they had believed that the right of the respondent to participate in dividends, by virtue of its indemnity agreement, was in anywise involved in the case, they would have proposed an appropriate provision in the decree to settle and determine such right. At the trial of the case it was stipulated and agreed that the County should be paid the remaining sum of $47,666.01 then due it (R. 68) and that, with the practical withdrawal of the County from further litigation in the case, the matter then resolved itself into a contest between the surety companies as to the merits of their respective claims to be subrogated to the rights of the County and of its Treasurer Groesbeck. (R. 68 *et seq.*) It follows that even though the right of respondent to indemnity was put in issue by the pleadings, as suggested by the Circuit Court of Appeals in this case (R. 238), it was proper for the trial court and the Circuit Court of Appeals in the first case to treat that issue as eliminated by this stipulation. That was clearly its effect and apparently its purpose; for Mr. Jensen, attorney for the American, stated:

> "This litigation as it now stands is purely litigation between the official bondsmen, the American Surety on the one side and the Massachusetts Bonding Company and the National Surety Company on the other." (R. 173)

This brought from the Court the question:

> "It is a contest between these bond companies as to priority?"

To which Mr. Jensen replied:

"That is the case, your Honor." (R. 174)

No effort was made by respondent to secure a separate judgment against the Receiver arising out of the indemnity agreement.

In its brief on that appeal the American said:

> "The National Surety Company now claims right of *subrogation* as to future dividends on E. J. Groesbeck's deposit and as to the Crystal Lake bonds, prior to the American Surety Company of New York, the assignee of E. J. Groesbeck and Salt Lake County, and in this case the National Surety Company is appealing *from a decree of the District Court holding that it was not entitled to such rights* until its obligee E. J. Groesbeck had been made whole." (R. 191)

> "The primary questions in this case are, therefore:

> First. Now that Salt Lake County has been paid in full, which surety company is entitled to priority as to dividends from the Receiver, *on E. J. Groesbeck's unpaid deposit, as County Treasurer with the bank?*

> Second. What are the rights of the two surety companies with respect to the $360,000.00 par value Crystal Lake bonds taken by E. J. Groesbeck as aforesaid and subsequently assigned to the American Surety Company of New York." (R. 191)

> "Appellant's counsel reminds us that as an *additional contractual fact* the National Surety Company had an agreement for indemnity with the National City Bank (Appellant's Brief 18 to 23 and

Tr. 87). *We deem this agreement wholly immaterial to the issues of this case but we refer to it here to get before the court all the alleged contractual relationships of the parties.*" (R. 192)

"As we understand them, the contentions of the National Surety Company are substantially as follows:

That the indemnity agreement of the bank, embodied in the bank's application to the National Surety Company for depository bond, gives the National Surety Company a direct legal right, *not to indemnity out of the general assets of the bank as such,* but to indemnity out of *the dividends declared and payable upon the claim of Mr. Groesbeck.* * * *" (R. 192).

"The contention that the National has a legal right, through the bank's promise of indemnity, to *take its indemnity out of the dividends payable on the Treasurer's claim,* is another way of saying that the National by contract with the bank, to which the Treasurer was not a party, acquired a right *against the Treasurer to take or share in his dividends.*" (R. 192)

From these statements it appears that the American regarded the National's claim under its indemnity agreement, in so far as it figured in the first action, as merely an attempt on the part of the National to assert, by virtue of that agreement, some sort of superior right of *subrogation* to the claims of the County and its Treasurer against the bank. In its brief before the Circuit Court of Appeals in the first case, the American said further:

"It is very clear from the foregoing case, and clear upon principle, that the indemnity agreement between the bank and the National must be

treated as a separate contractual arrangement affecting only the National and the bank." (R. 192)

"We submit that both upon principle, as a plain matter of contract, and upon the authority of the case above mentioned, there is nothing in the National's so-called indemnity agreement with the bank that gives it any standing or any rights in the present litigation." (R. 193)

"It follows, therefore, that the National, neither through its creditor, the Treasurer, nor through its principal, the bank, has acquired any rights and that under neither rule is it entitled to subrogation. *The National is claiming rights of subrogation under facts and circumstances where no such rights can arise.*" (R. 193)

The Circuit Court of Appeals in the first case adopted the view so strenuously urged by the American and, in its own opinion, held that:

"These cases involve the question of appellant's right to share by way of *subrogation,* in certain dividends in the hands of one Jenkins, and accruing from assets, which came into the hands of Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah * * * as also the right of appellants to participate in the proceeds of certain securities in the hands of one Groesbeck." (R. 110)

"The single question is whether, upon the facts stated, the law and the equities give these remaining dividends and the proceeds of the Crystal Lake Farm bonds, *after the County has been paid in full,* to the appellant National Surety Company or to the appellee American Surety Company." (R. 112)

"The rule applicable to this situation seems to be fairly well settled. The rule is that 'the right

of *subrogation* cannot be enforced until the whole debt is paid.' " (R. 114)

"The confusion in the case at bar arises from a mistaken view as to the identity of the actual creditor of the bank, as also the identity of the company, the money of which in part made this creditor whole * * *. The rule deducible from the cases is, that until the creditor is paid in full, no right of *subrogation* exists in favor of sureties who paid a part of the debt. In short, the creditor may insist on getting his full pound of flesh before others are allowed to sit at the banquet board." (R. 114)

Following the decision of the Circuit Court of Appeals in the first case, the National applied to this Court for a writ of certiorari. The American filed a reply to said application and expressed its opposition in a brief wherein it used language, shown by the Record in this case, as follows:

"But the Circuit Court of Appeals held, not this, but that the County was not upon all views the creditor of the Bank, as the National insisted, notwithstanding that the money deposited in the Bank was in some aspects there as a trust fund; that in such view as was necessary to determine the rights of subrogation though of course not necessarily upon all views, the Treasurer was the debtor of the County and the Bank the debtor of the Treasurer, not the County." (R. 209)

"Instead of having departed from this rule, the Circuit Court of Appeals in the instant case, as indicated in the quotation above from the opinion, itself decides that the Treasurer, in such view as is necessary to determine the question of *subrogation,* is the debtor of the County and the Bank the debtor of the Treasurer." (R. 209)

> "Cases are numerous holding, under language similar to that in the National's bond, that such a bond stands back of the entire deposit, not simply such part thereof as is equal to the penalty, and therefore holding that there is no *subrogation* until the whole debt has been paid." (R. 209, 210)

> "*The case involves merely a private dispute as to subrogation between surety companies.*" (R. 210)

As already noted, although the respondent on interpleader in the earlier action had set up its indemnity agreement and had asserted its right to participate in dividends based thereon, no issue was joined between the Receiver and respondent on that matter. Moreover the Receiver filed no brief nor took any part in the appeal. In the present case, however, we find the Receiver contesting vigorously the right of respondent to recover upon its indemnity agreement. The reason is obvious. The right in question is involved in this action but was not involved, and the Receiver did not consider that it was involved, in the earlier action.

The Circuit Court of Appeals upon this view of the case, affirmed the trial court in its decree in the first case awarding *subrogation* and said nothing whatever about the right of the respondent, growing out of its indemnity agreement. Based upon the record as thus made, the Circuit Court of Appeals in the present case, in passing upon the question of whether the subject-matter of the action was *res judicata* by reason of the decision in the subrogation suit, was able to say (R. 234) with entire correctness:

> "At the commencement of the trial a stipulation was entered into between counsel by which it was agreed that the balance due Salt Lake County

should be paid out of the fund, and an order was entered directing that such payment be made. Counsel for the American Company and the County thereupon announced that the litigation as it then stood was wholly between the American Company on the one side, and the Massachusetts Company and the National Company on the other side, as to which was entitled to the prior right of *subrogation* to the balance of the second dividend, to the future dividends to be paid on the deposit of Groesbeck, as Treasurer, and to the Crystal Lake bonds. *That was the sole issue tried by the court and determined and adjudicated by its decree.* That was the sole issue considered by this court on the appeal of the cause. See National Surety Co. v. Salt Lake County, 5 F. (2d) 34, where District Judge Faris, speaking for the court, said:"

The court here cites the extracts from the opinion in the subrogation case, which we have quoted above, and continues:

"The first question presented is whether the decree in the former suit is a bar, under the doctrine of *res adjudicata,* to the claim and right which the National Company now asserts. In their complaint in the former suit, the American Company and Groesbeck asserted and claimed that the American Company was *subrogated* to the rights of Groesbeck, as Treasurer, and of Salt Lake County in the excess of the second dividend, in the future dividends, and in the Crystal Lake bonds. The order of interpleader brought the National Company in *solely for the purpose of determining whether it or the American Company had the prior right of subrogation* to those specific funds and bonds. When the cause came on for hearing, counsel for the American Company and the County announced that the sole question to be

determined was whether the American Company or the National Company and the Massachusetts Company were entitled to the prior right of *subrogation.* While the indemnity agreement of the National Company was pleaded and introduced in evidence, it was upon the theory that it gave a superior equity to the National Company, and because thereof, a prior right of subrogation."

The court here cites in part the extracts from the brief of the American Company which we have quoted above. It then says:

"It is clear that the parties, the trial court, and the appellate court, were of the opinion in the former suit *that the National Company's direct claim against the bank on its contract of indemnity and the right to dividends thereon were not there involved.* The prior right of *subrogation* to the dividends on the claim of the county and to the proceeds of the Crystal Lake bonds was the sole issue litigated, the sole question determined by the decree, and the sole question passed upon by this court on appeal. The right of the National Company, because of its contract of indemnity, to participate in the dividends payable on the deposit of Groesbeck as Treasurer was denied, but the right of the *National* Company to *participate in dividends* as a general creditor *upon the contract of indemnity* was neither considered nor determined.

The cause of action asserted by the National Company in the former suit was predicated upon its alleged right of *subrogation.* The cause of action sought to be enforced by the National Company in this case is predicated upon its *contract of indemnity.* It is a cause of action which is wholly independent of, and entirely separate and distinct from the alleged cause of action asserted

by the National Company in the former suit. Since the National Company seeks relief in the instant case upon a different and distinct cause of action from the one asserted by it in the former suit, the judgment in the former suit is conclusive only as to such points or questions as were actually in issue and adjudicated therein." (Citing authorities.)

"It is true that the National Company, in its answer in the former suit, alleged the contract of indemnity, and prayed that its claim thereon against the receiver be allowed and approved. But such claim was not a proper subject for litigation in the former suit. *It was the subject of an independent suit by the National Company against the receiver.* The American Company so contended in its brief on appeal in the former suit. Since it is a matter which could not properly have been litigated, and was not actually litigated, and was not necessarily determined by the decree, in the former suit, it is not concluded by that decree although it was put in issue by the pleadings." (Citing authorities.)

It follows that the claim sued upon in this case was not *res judicata* by reason of the decision in the first case, and that the said claim must be determined on its merits.

II.

THE RESPONDENT'S RIGHT TO INDEMNITY.

(a) Statement of the Right.

Entirely separate and distinct from and in no manner dependent upon or related to rights by subrogation is the right of a surety who pays the debt of his principal in whole or in part to be reimbursed by such

principal. And if the principal be insolvent, this right of the surety to indemnity makes him, as a creditor of his insolvent principal, a general claimant against his estate with the right to file a claim and to be paid dividends thereon in common with other general creditors. Some phases of this subject have already been referred to in our discussion of the distinction between subrogation and indemnity. The legal basis and some of the incidents of this right to indemnity were so well and forcibly stated by the Circuit Court of Appeals in U. S. F. & G. Co. vs. Centropolis Bank, 17 Fed. (2d) 913, that we here quote somewhat fully from that case:

> "It is well settled that when a contract of suretyship is made there arises, in the absence of an express agreement, an implied contract that the principal will indemnify the surety for any payment the latter may make to the creditor in compliance with the contract of suretyship. This implied contract arises when the suretyship is made, and not when the payment is made by the surety thereunder. The relation of debtor and creditor exists between the principal and surety from the time the contract of suretyship is made. The payment relates back to the time when the contract was entered into by which the liability to pay was incurred, fixes the amount of damages for which the principal is liable to the surety and matures the cause of action therefor. Rice v. Southgate, 16 Gray, 82 Mass. 142; Griffin v. Long, 96 Ark. 268, 131 S. W. 672; In re Stout (D. C.), 109 Fed. 794; Smith v. Young, 173 Ala. 190, 55 So. 425; Hatfield v. Merod, 82 Ill. 113; Berry v. Ewing, 91 Mo. 395, 3 S. W. 877; Martin v. Ellerbe's Admr., 70 Ala. 326, 335; Poe v. Dixon, 60 Oh. St. 124, 54 N. E. 86, 88; Loughridge v. Bowland, 52 Miss. 546; Bragg v. Patterson, 85 Ala. 233, 4 So. 716, 717; Barth v. Graf, 101 Wisc. 27, 76 N. W. 1100, 1103; Nally v. Long, 56 Md. 567; M. Kahn & Bros. v. Bledsoe, 22 Okla. 666, 98 Pac. 921.

In Rice v. Southgate, *supra*, the court said:

'Upon well settled principles, it is clear that the contract of a principal with his surety to indemnify him for any payment which the latter may make to the creditor in consequence of the liability assumed takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied contract or promise of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages for which the principal is liable under his original agreement to indemnify the surety. Gibbs v. Bryant, 1 Pick. 121. Appleton v. Bascom, 3 Met. 169.'

In Griffin v. Long, *supra*, the court said:

'The true rule seems to be that the surety becomes a creditor of the principal at the time he signs the note as surety, and not at the time he pays the same.'

In Smith v. Young, *supra*, the court said:

'Although a surety cannot maintain an action against his pricipal on the liability created by the suretyship, until such surety has paid the debt or a part thereof, it is because the right of action does not come into existence until such payment, and not because the relation of debtor and creditor did not theretofore exist. The same thing is true as to the creditor or payee of a note signed by the principal and surety. The payee cannot sue the principal or the surety until the note is due, yet the relation of debtor and creditor certainly exists from the making of the note.'

In M. Kahn & Bros. v. Bledsoe, *supra,* the court said:

'It has been repeatedly held by the courts that a surety is a creditor of his bankrupt principal, and that he is such creditor before default and from the date of signing the note.'

A fortiori such results must follow where an express contract of indemnity is made.

The contract of indemnity created the relation of debtor and creditor between the bank and the Surety Company from the date the contract of suretyship was executed and delivered to Jackson County. The payment made by the Surety Company related back to the date of the contract of indemnity, fixed the amount of damages for which the bank was liable to the Surety Company and matured the latter's cause of action on the contract of indemnity.

It follows that the Surety Company became a creditor of the bank on May 19, 1923, when the county depository bond was executed and delivered; that the Surety Company was a creditor of the bank when the bank became insolvent, closed its doors and went into the hands of the Deputy Commissioner of Finance for the purpose of liquidation on November 14, 1924; that upon the payment by the Surety Company of the penalty of the bond on May 7, 1925, a cause of action accrued in its favor against the bank which had its inception in the contract of indemnity and which related back to the date of the contract of suretyship made May 19, 1923,"

In Mellette Farmers Elevator Co. v. H. Poehler Co., 18 Fed. (2d) 430, 431, the court said:

"When a contract of suretyship is made, there arises, in the absence of an express agreement,

an implied contract, that the principal will indemnify the surety for any payment it may be required to make under the contract of suretyship. This implied agreement comes to life when a contract of suretyship is made; from that time on the relation of debtor and creditor exists between the principal and surety. The payment of the money under the contract by the surety merely fixes the amount of damages for which the principal is liable, and relates back to the time the contract was entered into."

In Stearns on Suretyship (3rd Ed.) Sec. 279 it is said:

"If the promisor in a suretyship pays the debt of the principal in whole or in part, he is entitled to recover the amount paid from the debtor. If the principal makes no express promise to indemnify the one who engages to answer for his debtor default, the law will imply a promise. * * * From the time of the very earliest cases there has been a general acquiescence in the rule that a payment by a surety or guarantor for the account of their principal is presumed to be at the request of the latter, which raises an implied promise of reimbursement, upon which an action at law will lie."

See also:

1 Brandt on Suretyship (3rd Ed.) Sec. 226.
Newman v. Goza, 2 La. Ann. 643, 645.
Ritenour v. Matthews, 42 Ind. 7, 14.

As pointed out by the Court of Appeals in the instant case the National was the creditor of the bank from the date of the indemnity agreement by reason of having loaned the bank its credit.

> "One who loans his credit to another is as much his creditor as one who loans his money to him. A creditor is 'one who has the right to require the fulfillment of an obligation or contract. Bouv. Law Dict. p. 435.'" Schwartz vs. Siegal, 117 Fed. 13, 17.

No new contract was made when the National paid the penalty of its bond. The payment merely fixed the amount of damages for which the bank was liable under its indemnity agreement. Payment by the National matured and fixed the amount of the debt and gave rise to a right of action at law for reimbursement. This debt owing by the bank to the National was entirely new and distinct. It was in no sense the debt, or any part of the debt, which the bank originally owed Groesbeck and the County. Being a separate and distinct claim and a valid and binding obligation of the bank it should have been allowed by the Receiver and dividends paid thereon.

Townsend v. Sullivan, 3 Cal. App. 115, 84 Pac. 435, where it is said:

> "Where the administratrix of a surety paid the principal's debt in order to relieve the surety's estate from liability, an entirely new and distinct debt, due from the principal to the surety's estate was created, and the principal became liable to the estate for the full sum paid by the administratrix with interest at the legal rate."

Yndo v. Rivas, 107 Tex. 408, 142 S. W. 920, Id. 180 S. W. 96, where it is said:

> "When a surety pays a debt for his principal, the surety's claim for reimbursement is not on the original debt, but on an implied promise arising out of the relation of the parties."

Hill et al v. Wright, 23 Ark. 530, 532, where it is said:

> "But the obligation of principals to reimburse to sureties the money paid by them, is not founded on the bonds which sureties give for their principals, but on the express contracts of indemnity which the parties make, or upon the implied promise raised by the law upon the payment of money for another at his request."

In Ryland v. Commercial, etc., Bank, 127 Cal. 526, 59 Pac. 989, a surety paid the note of a corporation and later brought an action against a stockholder to enforce his statutory liability. At the time of bringing this action the liability of the corporation on the note was barred by the statute of limitations. The court held:

> "The law implied an agreement on their part to indemnify the surety whenever he paid the obligation and this implied agreement was distinct from their liability to the payee. The right of action upon the libility arising out of this implied agreement accrued upon payment by the surety, and not before."

The contract of indemnity which the bank entered into with the respondent was not in contravention of any provision of law or of the public policy of the State of Utah, nor was it in contravention of any act of Congress relating to the conduct of national banks. It was therefore a legal and enforceable contract and no contention is made to the contrary. *National Surety Company vs. Blaumauer* (C. C. A. 9), 247 Fed. 937; *Western Surety Company vs. Kelly*, 27 S. D. 465, 131 N. W. 808; *U. S. F. & G. Co. vs. Centropolis Bank of Kansas City*, 17 Fed. (2d) 913; 31 C. J. 424 Sec. 16.

The depository bond executed by the respondent, and in which Groesbeck as Treasurer of Salt Lake County was obligee, detracted nothing from the force or scope of the indemnity agreement. There is nothing in the bond which indicates any agreement as between the bank, the respondent and Groesbeck that the claim of the County upon its contract of deposit should be given any priority over the claim of the Surety Company upon its contract. This being true, there is no reason in law or in equity why the contract of indemnity upon which this action is based should not be enforced.

(b) Cases Supporting Respondent's Claim.

The decision of the Court of Appeals in the case at bar was based largely upon its own decision in the case of U. S. F. & G. Co. vs. Centropolis Bank of Kansas City, 17 Fed. (2d) 913, from which we have already quoted at some length. Other cases supporting the view for which we centend are:

U. S. F. & G. Co. vs. Carnegie Trust Co., 177 App. Div. 176, 164 N. Y. S. 92, Id., 221 N. Y. 646, 117 N. E. 1086;
American Surety Co. vs. National Bank of Barnesville, 17 Fed. (2d) 942;
In re Daily, et al., 19 Fed. (2d) 95;
Mellette Farmers Elevator Co. vs. H. Poehler Co., 18 Fed. (2d) 430;
United States F. & G. Co. vs. McClintock, et al., (D. C. District of Wyoming, not officially reported), decided 9-2-27.
Title Guaranty & Surety Co., vs. Shattuck, et al., 224 Fed. 401.
Tennant vs. U. S. Fidelity & Guaranty Co., et al., 17 Fed. (2d) 38.

In U. S. F. & G. Co. vs. Carnegie Trust Company, *supra,* while the surety's right to *pro tanto* subrogation was denied, the entire deposit for which it was surety not having been paid, the court said:

> "It does not follow, however, because the surety cannot be subrogated to the claims of the bankrupt's creditors that it has no claim for the monies paid on the surety bond. The Carnegie Trust Company gave its indemnity agreement covenanting to make good to the surety company any monies which that company should be compelled to pay under its bond. The surety company thus has become the creditor of the Carnegie Trust Company to the extent of the required payment, and its right to its dividend cannot be impaired by the fact that the claim arises upon a payment of a deficiency upon another debt of the Carnegie Company which has already had its full dividends. To hold otherwise would hold nugatory the indemnity agreement. The surety's holding that one debt of a bankrupt cannot create two liabilities against the surety apply only where the creditor is thus seeking an undue proportion of the assets of the bankrupt. No such result can be here reached, and the surety's claim here arises, as any other claim might arise, out of a contract which itself contemplates the possible inability of the debtor to pay a certain debt in full."

In American Surety Company vs. National Bank of Barnesville, et al., 17 Fed. (2d) 942, after quoting authorities in support of the general rule that 'a surety liable only for a part of a debt does not become subrogated to collateral, or to remedies available to the creditor, unless he pays the whole debt or it is otherwise satisfied," the court said:

> "The written application, signed by the bank through its officers, accepted by the surety com-

pany, evidenced by the issuance of the surety bond thereon, constituted a contract of indemnity, limited to the terms of indemnity expressed therein. The relationship of debtor and creditor between the bank and surety company was created on the acceptance of the application by the surety company. Liability dated from that moment. The question of the amount of the liability became a determinable factor only after default upon the bond of the bank and the payment of the surety liability by the surety company.

At the time the surety company presented its claim to the receiver for allowance, it had a right of action on its indemnity contract. Title Guaranty & Surety Company vs. Hannon and others (C. C. A.) 265 Fed. 116. If there are no other reasons, outside of what is presumptively shown by the record in this case, why this right of action of the surety company could not be developed into a judgment, or some other reason why the surety company should be put to suit to establish its right of action, it would seem that the receiver erroneously rejected the surety company's claim. If this apparent right of action were transformed into a judgment, no reason is discernible why, in that form, it would not be a claim of an unsecured nature against the bank, and that the surety company would be a creditor on a parity with other unsecured creditors.

So far as the prayer of the bill prays for an order directing the receiver to accept the complainant's claim by reason of the right of subrogation, the same is denied; the defendant receiver will deduct from the claim of the defendant Board of Education, filed and allowed by him, the sum of $6,000.00 (the amount paid by the surety company) and will recover from the defendant Board of Education all sums paid to it as dividends upon the said amount of $6,000.00, and this cause is continued for a period of thirty days for such further proceedings as may be desirable in the premises."

At the bottom of page 30 of the brief of petitioners an attempt is made to discredit this case by the following comment:

> "Here then we have the anomalous situation of a court deciding that the surety could not enjoy rights by way of subrogation as a matter of law and then proceeding as a matter of fact to allow and direct that it be given such rights."

Of course, it is obvious that however the court may have erred, if it did err, in applying the remedy, its purpose was to allow the surety company to participate in dividends on the basis of its indemnity agreement. The force of the decision as a precedent is, therefore, in nowise weakened.

In re Daily, et al., 19 Fed. (2d) 95, Daily and Ivins were under contract with the City of New York, secured by a bond. The contractors defaulted and the bond was paid. There was in that case, as in this, an indemnity agreement and the surety company proved its claim and sought to recover as against the bankrupt estate. The court said:

> "The learned Referee took the view that the indemnity agreement of the American Surety Company did not create any other rights than those of subrogation, so far forth as the estate of the bankrupt partnership was concerned, and disallowed the claim, taking the view that the only rights of the surety were by subrogation under section 57-I of the Bankruptcy Act (Comp. St. Sec. 9461), and in support of his position relied upon the case of Williams vs. Fidelity Insurance & Guaranty Company, 236 U. S. 549, 59 L. ed. 713. Since the contract of the parties gave the American Surety Company larger rights than

> those of subrogation and indemnity, it would seem that, so far as the surety company's contract was breached (and there is no dispute about that), it is entitled under the contract to damages which it has proved in the sum of $90,000.00, and may prove the same against all estates."

This case was reviewed by the Circuit Court of Appeals for the Third Circuit in Tennant v. U. S. Fidelity & Guaranty Co., et al., 17 Fed. (2d) 38. The decision of the trial court was affirmed and its opinion adopted as the opinion of the Circuit Court of Appeals.

In Mellette Farmers Elevator Company vs. H. Poehler Company, 18 Fed. (2d) 430, 431, the court said:

> "Applying these rules to this case, it is obvious that the Fidelity & Deposit Company of Maryland on the 8th day of June, 1921, when it executed and delivered the bond here involved, became a creditor of the H. Poehler Company, principal on the bond; that upon the payment of the judgment rendered against it for the full amount for which it could be liable under the bond, it became entitled to reimbursement under the implied contract of indemnity. Up to the time of the payment of the amount of the bond, it was in the position of a creditor having an unliquidated claim. It now has a liquidated claim antedating the receivership."

In U. S. Fidelity & Guaranty Company vs. McClintock, et al., (District of Wyoming, not officially reported), the court after reviewing the case of U. S. Fidelity & Guaranty Company vs. Centropolis Bank, 17 Fed. (2d) 913, and the decision of the Circuit Court of Appeals in the instant case, 18 Fed. (2d) 707, held:

"In the absence of any discoverable distinguishing features between those cases and the case at bar, the holding of this court must be that the depository surety is entitled to have its claim allowed by the receiver for the full amount of its payment upon its indemnifying bond and to participate with the general creditors in all unpaid and future dividends."

In Title Guaranty & Surety Co. v. Shattuck, et al., 224 Fed. 401, the court said:

"It (the surety) had never undertaken to pay all the debts of the Product Company; the promise was to pay them up to the limit of the penal sum, and, having discharged that obligation, it was bound no further to those creditors either legally or equitably. The position of counsel is based on the evident assumption that the surety company is still under some obligation to those creditors, and therefore cannot be allowed to share in the fund until the creditors themselves have been paid in full."

(c) Cases Relied Upon by Petitioners.

In opposition to the cases supporting the respondent's view petitioners rely upon certain cases to which reference will be made. Among these is a case in the Fourth Circuit Court of Appeals,—Maryland Casualty Company vs. Fouts, 11 Fed. (2) 71. In that case the surety company having made payment of the amount of its bond, $50,000.00, and while a balance of $39,000.00 of the deposit of the State Treasurer remained unpaid, claimed, as stated by the court:

"(1) That when it paid to the State Treasurer of North Carolina $50,000.00, it was entitled to

> prove its claim for that sum; (2) that it was subrogated by reason of the payment of $50,000.00 to the claim of the State Treasurer of North Carolina to that amount against the bank and its assets; (3) that it was entitled to dividends as any other creditor of the bank upon the $50,000.00."

It is clear from the opinion in this case that the court based its decision wholly on the claimed right of *subrogation.* Apparently the court treated the contention of the surety that it was entitled to dividends as any other creditor of the bank, as not involved in the case, or, if involved, that it was covered by the prayer for equitable subrogation, for the court said (p. 73):

> "The appellant, plaintiff in the District Court, is asking equitable relief, in that it may be, by way of subrogation, placed in the position of one whose indebtedness it has paid under an indemnity bond executed by it to the bank of Salisbury to cover an indebtedness of that bank to the State."

It very properly decided that until the state had been paid in full the surety had no right by subrogation, and then added, without discussion and apparently without consideration of the asserted right "to dividends as any other creditor," "*or otherwise.*" These two words "or otherwise" are all that petitioners can find in the Fouts case upon which to base the contention that the case is an authority against the right under contract for which the respondent is here contending. It requires an active imagination, to say the least, so to construe that case. The Fouts case can hardly, therefore, be considered as a deci-

sion *contra* to those of the Circuit Court of Appeals of the Eighth Circuit in U. S. Fidelity & Guaranty Co. vs. Centropolis Bank of Kansas City, 17 Fed. (2d) 913 and in the case at bar. If it is to be regarded as such a decision, it was repudiated in Judge Phillip's opinion in the Centropolis case, for he said:

> "This conclusion has not been reached without a careful consideration of the opinion of the Fourth Circuit in the case of Maryland Casualty Company vs. Fouts, *supra*."

Another case strongly, but unjustifiably, relied upon by petitioners is Zimmerman (Commission of Banking) vs. Chelsea Saving Bank, 161 Mich. 691, 125 N. W. 424. In proceedings to liquidate the assets of the bank in that case the American Surety Company was permitted to file a petition in intervention and the receiver was ordered to answer it. The surety company had written a depository bond in the sum of $50,000.00 based upon an indemnity agreement similar to that involved in this case. It contended, as stated in the opinion of the court, that the State as a sovereign was entitled to priority of payment as against other creditors of the bank, and that if it had exercised such right the surety would have been absolved from payment, or, if it had paid, would have found itself in position to be fully reimbursed. It asserted its right to stand in the place of the State and demand priority of payment because the State, as it contended, might have demanded it.

It further contended that it was entitled, upon paying the penalty of its bond, to be subrogated, *pro tanto*, to the right of the State against the bank, notwithstanding the fact that the debt of the bank to the State

had not been fully paid; that where there is a bond to secure a floating balance which may exceed the amount of the bond, the surety is entitled to have the dividends pro rated to the whole debt, so that it might have the benefit of that part applicable to its payment or to have it applied in reduction of the penalty of its bond; and that the surety under the indemnity agreement was entitled "to stand as a creditor of the bank and receive its share of any dividends paid."

It is very doubtful, to say the least, that the claim of the surety company in that case "to stand as a creditor of the bank and receive its share of any dividends paid," was, in any sense, an issue in the case, except in so far as subrogation in some form to the rights of the State against the bank was involved. This appears from the court's summary of the position taken by the receiver in opposition to the claims of the surety. It said:

> "On behalf of the receiver it is asserted, first, that a surety is not entitled to subrogation upon payment of a part of the debt; second, that the debt, in this case, is a whole amount due from the bank to the State; third, that the bond given by the intervenor affords protection to the State for any ultimate balance arising out of the dealings between the State and the bank as a depository of the State moneys; fourth, that the State is not entitled to priority."

It thus appears that no clear issue was made in that case as to the right of a surety to stand as a creditor of the bank by virtue alone of its indemnity agreement and payment of its bond; and it appears probable that it was in no sense an issue as the case went to the Supreme Court. This point is not noticed

in the decision of the Supreme Court, and that decision cannot, therefore, be accepted as an authority against the allowance of the right which the respondent is now seeking to enforce.

Petitioners cite other cases in which the decisions had to do entirely with the right of subrogation; but subrogation is not here involved directly nor indirectly. They emphasize language found in the opinions in such cases to the effect that the undertaking of the surety must be construed as security for the whole debt, and that it is not entitled to participate in dividends until the whole debt has been discharged. In the light of their particular facts, these cases amount to nothing more than a restatement of the well established rule that a surety, liable only for a part of the debt, cannot be subrogated to the rights of his obligee until the latter's debt has been paid in full. Such cases have no authority as precedents in the construction of the law governing the right of a surety under an indemnity agreement.

III.

REPLY TO OPPOSING ARGUMENTS:

(a) That the National Under Its Contract is Not Entitled to Participate in the Assets of the Bank in Competition With Groesbeck and Other General Creditors, Before Groesbeck Has Been Paid in Full.

In support of their general contention that it would be inequitable to permit respondent under its contract of indemnity to receive dividends from the assets of the bank until Groesbeck and the surety on his official bond, the American, have been paid in full, petitioners say:

"To allow the National to recover anything on its indemnity agreement until Groesbeck has been made whole is to violate the plain terms of the National's guaranty to him and to reduce its liability as guarantor of his entire deposit, a liability which continued 'as well after as before' the payment of the penalty of its bond." (Petitioners' Brief top p. 11.)

*"The National's bond stands not behind any particular part of Groesbeck's deposit, but behind all of it so as to be a guarantee against ultimate loss—a guarantee of the last $125,000.00, or any part of it. * * * The authorities clearly establish that it was his right to receive dividends upon his deposit from the Receiver as long as dividends were available, and then to call upon the National for the residue of his debt or deposit up to the full penalty of its bond."* (Petitioners' Brief p. 12.)

"If we read the decisions correctly, the National's contract is not simply an agreement to pay the penalty of the bond. It is also a guarantee of Groesbeck's entire deposit. The latter obligation and the legal liability in connection therewith continued as well after as before the National paid the penalty of its bond." (Petitioners' Brief p. 27.)

These arguments are not sound. The National's liability was limited to the penalty of its bond. When it paid this penalty, its bond was exonerated. It no longer continued liable as a guarantor of the entire deposit, nor did its liability continue "as well after as before" payment, except in the sense that until the deposit, which it guaranteed in part, was paid in full the surety could assert no claim to be subrogated to the rights of the Treasurer against the bank, or to any collateral which he may have held.

This contention was answered by the Circuit Court of Appeals in the Centropolis Bank case, *supra*, as follows:

> "We think that a construction of the bond in the instant case in accordance with above rule compels the conclusion that it was the intention of all of the parties to the contract that the Surety Company should be liable to the county for all of the principal of the county's deposit, together with interest thereon, up to and including, but not exceeding, the sum of $50,000, and that the recital in the bond that the penal sum thereof is $50,000, just as effectually limits the language of the condition as if there had been written into the language of the condition itself the words 'up to and including but not exceeding $50,000.' It is true that the liability under the bond was not limited to any particular portion of the whole deposit. In that sense, the bond was security for the whole deposit, and for that reason the right of subrogation does not exist, but the maximum amount for which the Surety Company could be held liable thereunder was expressly fixed at $50,000. The Surety Company has discharged that liability by payment in full. The county has received all that it contracted for from the Surety Company. How then can the county say that the spirit of the guaranty will be violated? We find nothing in the language of the bond which justifies the contention that the claim of the county upon its contract of deposit should be given any priority over the claim of the Surety Company upon its contract."

In the case of Leggett v. Humphreys, 21 How. 66, 16 L. ed. 50, 54, this Court said:

> "Sureties are never held responsible beyond the clear and absolute terms and meaning of their

> undertakings. Presumptions or equities are never allowed to enlarge or in any degree to change their legal obligations * * *. The undertaking of the surety is essentially a pledge to make good the misfeasance or nonfeasance of his principal to an extent coextensive with the penalty of his bond."

In this connection it should be noted that the bank specified in its application for the National's bond that $125,000.00 was the

> "Maximum amount of deposit bond is required to secure." (Par. 4, R. 58.)

Petitioners further contend that:

> "*As long as Groesbeck is unpaid to the extent of $1.00, the National, by the terms of its bond, is required to stand back and withhold interference with any of the securities to which Groesbeck might resort; otherwise the National does not lose the $125,000.00 as it has agreed, and just to the extent to which it minimizes its loss at the expense of Groesbeck it is relieved from the obligation of its contract.*" (Petitioners' Brief p. 12.)

To contend that the National *agreed to lose $125,000.00* is to indulge in loose thinking. It made no such agreement. It agreed to pay the Treasurer $125,000.00 or so much thereof as might be necessary to make up its deposit with the bank. That was the extent of its agreement, but prudently it took such measures as seemed necessary to protect itself against loss in the event the bank became insolvent. That was its right. It cannot however, be subrogated to the rights of Groesbeck against the bank or to stand in his place with reference to the collection of

dividends to be paid *on the County's deposit* until the Treasurer has been paid in full in accordance with the "familiar rule of the law of subrogation under which a surety liable only for part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied." *United States vs. National Surety Co.*, 254 U. S. 73, 76.

The contract of indemnity provided:

> "That all declarations and answers made in the foregoing application are true, and that the same are made for the purpose of inducing the Company to execute the bond applied *for without demanding collateral security from the depository.*" (R. 10) * * *

It thus appears that the National took the indemnity agreement in place of collateral security, which it might legally have demanded from the bank.

Let us suppose that the National had required collateral security and that the bank had given it sufficient to fully protect it against loss. This fact would not have made necessary any change whatever in the language of the depository bond. Under such circumstances there could be no doubt of the National's right to retain and to realize on its collateral, and it might very well have happened that the National, on the failure of the bank, would have been the only creditor who was in position to realize dollar for dollar on its claim and escape without loss. Under these circumstances, what becomes of the argument of petitioners that the respondent *agreed to lose $125,000?* Its utter fallacy is thus completely demonstrated.

The petitioners contend also that:

*"The National cannot by virtue of an independent agreement with the bank, to which Groesbeck was a stranger, assert rights to any moneys by way of dividends paid by the Receiver, until Groesbeck has been paid in full and until the obligation of the National's bond which stands behind his entire debt or deposit has been fully performed. * * * The fundamental difficulty which confronts the National in seeking to have its indemnity claim allowed and dividends paid thereon, is that it comes before the court with an outstanding contract of indemnity and guaranty to Groesbeck as yet unperformed and without prospect of full performance."* (Petitioners' Brief p. 11.)

*"If, on the other hand, the bond was, as the Circuit Court previously held, security for the whole deposit so as to prevent subrogation, then that guaranty in the National's bond likewise bars it as a matter of contract from receiving anything by virtue of its indemnity agreement until Groesbeck's debt has been paid in full * * *. Can it be possible that the National, seeking relief by subrogation, can be successfully confronted by the barrier of its outstanding and unperformed guaranty of Groesbeck's whole deposit, and that it can then pursue indemnity and avoid this same contractual barrier? Why should the contractual ground not be as effective and complete an obstacle to its recovery in the one case as in the other?"* (Petitioners' Brief p. 29.)

We see no difficulty whatever in holding that the National may enforce a claim against the bank springing from contract, notwithstanding the fact that it is not entitled to immediate subrogation to the rights of its obligee against the bank. If the contract was in all respects legal and valid, and its *enforcement not limited or restrained*, why should it not be enforced? Can any good reason be found for destroying

a right acquired by one surety through contract in order that the benefits expected by another surety from subrogation might be perhaps increased?

Petitioners urge the following questions:

> *"Suppose Groesbeck had never received anything from the National on account of its bond but had received all the dividends from the bank that the Receiver could pay? Suppose the dividends received had amounted to 60 per cent of his claim and he was still unpaid to the amount of $125,000.00. Suppose he then made demand upon the National for the payment of the penalty of its bond. Would the National then be required to pay Groesbeck the full penalty of its bond according to its terms, or would it be entitled to withhold 60 per cent and pay only $50,000.00? * * * Can it be, therefore, that by paying the penalty of its bond early, the National can so improve its situation as to change its legal rights and recoup itself to the extent of approximately $75,000.00, one-third of it at Groesbeck's expense."*
> (Petitioners' Brief, 20, 21.)

The time of payment could not change the National's legal rights under its contract, but the time of payment and of the maturing of its right of action might very materially affect its chances of recovery. That is a fact of common experience in all commercial transactions.

It might very well happen in the supposed case, if the respondent had slept on its rights in the premises and had taken no steps looking to the protection of its interests in the event of being called upon later to make payment under its bond, and if the assets of the bank were exhausted before recourse was had to the sureties, that the respondent might have had to

pay the full penalty of its bond only to find itself unable to recoup its losses either through subrogation or indemnity. This fact would affect the value of its rights but not their character.

Even though it be conceded that the value of respondent's right in this case may have been affected by the diligence of Groesbeck in seeking payment on the National's depository bond, that fact cannot operate to destroy the right itself or even to change its character. This would merely be a fact in the case which could not change the law applicable thereto.

Was it inequitable (1) to Groesbeck or to the surety on his official bond or (2) to the general creditors of the bank, other than the respondent, to allow the respondent's claim on its indemnity agreement? These questions will be separately answered.

(1) It was not inequitable to Groesbeck nor to his official surety for several reasons. When Groesbeck made his deposit of County moneys he accepted as security in addition to the bond written by the National in the sum of $125,000.00, a bond written by the Fidelity & Deposit Company in the sum of $75,000.00, and one by the Massachusetts Bonding & Insurance Company in the sum of $25,000.00. To cover the balance of his deposit, amounting to $418,094.29, he accepted, as collateral, bonds of the Crystal Lake Farms Company amounting in par value to $360,000.00, and a personal bond executed by the directors of the bank which was intended to cover excess deposits. The Fidelity & Deposit Company had inserted a provision in its bond to the effect that upon payment thereunder it should be immediately subrogated to the rights of Groesbeck against the bank to the extent of its payment, and it was so subrogated without contest. This

was contractual and not equitable subrogation. It must be assumed that Groesbeck knew it was the custom of surety companies to protect themselves in that or some other manner. He himself had been obliged to give an indemnity agreement to secure his official bond. (R. 125-131.) For all he knew the respondent may have required the bank to put up collateral to protect it in whole or in part in the event it were required to pay the penalty of its bond. This would have been entirely lawful and within the proper authority of the bank. If the respondent had taken collateral, there could be no question later as to its right to realize on such collateral for its own protection, and Groesbeck would have been in no position to complain had it done so. But the argument which would deny the National the right to participate in dividends on the debt resulting from its indemnity agreement would, if sound, be equally potent to deny it the right to realize on its collateral security until Groesbeck had been made whole. Such, however, is not the law. If the National had taken collateral to secure it, it might well be that it would have been protected in full, but instead of this it took an indemnity agreement from the bank, under which it cannot now expect complete reimbursement. It is thus shown that securing the credit of the National through the giving of an indemnity agreement was a clear benefit rather than a detriment to Groesbeck, for the collateral, in place of which the indemnity agreement stood, was left in the bank to be converted into cash and distributed as dividends, a considerable percentage of which was paid to Groesbeck on the total of his large claim.

If the Treasurer now complains that he did not know of the indemnity agreement, the answer is that

he can no more complain of that fact than he can of the fact that he did not know what the other obligations of the bank were that would result in claims on which dividends would have to be allowed and paid. In the case of Merrill v. National Bank, 173 U. S. 131, 146, 43 L. ed. 640, 646, this Court said, that, as among the claimants to the assets of the bank, equality between them was equity, and then added:

> "But that was not inconsistent with the common law rule awarding to diligence, prior to insolvency its appropriate reward; *or with conceding the validity of prior contract rights.*" (Italics supplied.)

The bank was under no obligation to advise Groesbeck as to the manner in which it had secured the depository bond, whether by putting up collateral or the making of an indemnity agreement; nor can it be said that that duty rested upon the respondent. Any duty which existed in the matter was the duty of the Treasurer to take such steps as were necessary for the protection of his trust.

In this connection, it is proper to observe that if Groesbeck had taken adequate security for the County's deposit, that is to say, if he had taken surety bonds covering the entire amount, he would not now be complaining, or in position to complain, that he himself had not been paid in full. It was his duty under Sec. 4500 Compiled Laws of Utah, 1917, to take adequate security for the County's funds. Instead of doing this he took as such security bonds of the Crystal Lake Farms Company in the sum of $360,000.00. These constituted a non-liquid, frozen asset and this was known at the time the bonds were accepted. When these bonds were sold by the American Surety Com-

pany, they brought only $90,000.00 (R. 253, 255). This is some evidence at least that when accepted by Groesbeck they were worth much less than par value. Concerning these bonds the Receiver testified: "The Crystal Lake Farm Company bonds of the par value of $360,000 have no practical value at this time." (R. 70) The loss which Groesbeck will sustain, if any, is thus directly traceable to his own negligence in the acceptance of collateral of doubtful value. In the final analysis it could not be unjust or inequitable if some resulting loss should fall upon him who was primarily and directly responsible for failure to take adequate security for the deposit of the County funds. But no such loss will result as we later show.

(2) Nor can it be said that to allow the respondent's claim on its indemnity agreement would be inequitable to other general creditors of the bank.

In the first place it is to be observed that the transaction between the bank and Groesbeck was authorized by law and was solely for the purpose of securing a desirable deposit for the bank. It did not increase the liabilities of the bank for it had an asset in the deposit to offset the liability to Groesbeck. But the money in question being public funds, the Utah Statute required security for its repayment. Groesbeck deposited the County's money in the bank on the strength of the security received,—collateral and surety bonds. By repayment of the deposit the bank could have received the return of its collateral and the cancellation of the bonds. If the bank had taken its very best collateral, such as Government or other bonds of unquestioned stability and value, to the amount of the deposit, and had placed these with Groesbeck as security for the repayment of the Coun-

ty's funds, the transaction would have amounted to nothing more than an exchange of securities for cash. Neither the bank nor any of its creditors could be adversely affected by this transaction.

Now let us suppose that Groesbeck instead of taking this collateral and being forced to realize thereon in the event of the bank's failure, had preferred to take, as security, depository bonds written by reliable companies; and that, to indemnify these companies the bank, instead of putting up this collateral with Groesbeck, had put it up with the sureties writing the depository bonds. The situation would remain unchanged except that the transaction would have become tri-lateral rather than bi-lateral. In exchange for its securities the bank would still have the cash. In the event of failure the sureties would be under obligation to make good Groesbeck's deposit and, having done so, they could look to their securities, as well as subrogation to the rights of Groesbeck against the bank, in order to make themselves whole. *Merrill v. National Bank*, 173 U. S. 131, 43 L. ed. 640. The other creditors would be in no position to complain if the transaction had been handled in this manner.

But, going a step further, let us suppose that instead of putting up bonds or other collateral to indemnify the sureties loaning their credit to the bank, the bank had been able to secure this credit by merely giving indemnity agreements such as that which forms the basis of the present action. This would not be a detriment to the bank or its creditors. On the other hand it would be a distinct benefit for under this arrangement the bank would have the deposit and would, at the same time, retain the collaterals in its possession. Among other advantages this arrangement might well result in increased profits being earned for the bank,

but, at the very least, the collaterals would remain among the assets of the bank and, upon its failure, would, to the extent of their value, increase the funds in the hands of the receiver for distribution as dividends. And when the surety has paid the amount of its depository bond, how could there be anything unfair to other general creditors in allowing it to *draw dividends on its claim,* springing from the indemnity agreement and payment thereunder, *and thus recover only a part of its loss,* if there is nothing unfair in allowing it to hold and realize on *collaterals which it might have taken sufficient in value to give it complete protection?* The argument that the allowance of respondent's claim would be unfair or inequitable to Groesbeck or to other general creditors of the bank thus falls to the ground. The further argument that such allowance would establish a preference in favor of the County's deposit, in violation of the National Banking Act, is discussed under the next subhead of this brief.

Groesbeck and the American Have Been or Will Be Paid in Full.

Strong appeals for sympathy occur in the Petition for Certiorari and in Petitioner's Brief of which the following is typical:

> "*Groesbeck's deposit has not been repaid and there is no prospect that either he or his assignee or subrogee, the American Surety Company, will ever be repaid or made whole by many thousands of dollars if the present decision of the Circuit Court of Appeals stands and if the National Surety Company is thereby allowed to compete with Groesbeck and his assignee in the enjoyment of dividends from the bank's assets.*" (Petition for Certiorari, p. 4.)

We do not concede that considerations such as these can properly be allowed to affect, in any manner, the right asserted by the respondent in this case; and we notice them only because we think they give a wrong impression of existing facts. The receiver testified that, up to the date of filing his answer in this case, he had paid creditors "sixty per cent of the face of their claims" (R. 70). The claim of the County, originally $643,094.29, was decreased $75,000 when the Fidelity & Deposit Company was subrogated to its rights in that amount. Its outstanding certificate is, therefore, in the sum of $568,094.29. Payments made by the sureties have already been stated and we now know (R. 253, 255; Petitioners' Brief, p. 2) that $90,000 were realized from the Crystal Lake Farm Company bonds. We are thus enabled to make the following tabulation of payments already made to the County and/or to Groesbeck and the American on account of the County's deposit.

Received from:

Fidelity and Deposit Company, as surety for the bank	$75,000.00
National Surety Company, as surety for the bank	125,000.00
Massachusetts Bonding Company, as surety for the bank	25,000.00
American Surety Company, as surety for Groesbeck	200,000.00
Receiver, in dividends 60% on $568,094.29	340,856.57
Proceeds of Crystal Lake Farm bonds	90,000.00
TOTAL	$855,856.57

Of these payments the County received only the face of its original claim, $643,094.29. This sum deducted

from the total payments, $855,856.67, leaves a remainder of $212,752.26. This represents the sum repaid to the American by the Receiver. The American repaid the County only $200,000 of its deposit, and the American has already received $12,752.26 in excess of that amount.

"But," it will be said, "the American was, by the decree in the first case, awarded interest on the principal sum of $200,000.00 from the 29th day of February, 1924, until paid." That is true. It was also awarded $23,362.15 without interest. The American resisted payment to the County and suit was brought against it in the State courts. The County obtained judgment which was affirmed by the Supreme Court of Utah. The American was required to pay the sum of $23,362.15 as interest and costs.

The justice and propriety of requiring the receiver to repay the American this $23,362.15 and interest on the principal sum of $200,000 until paid, may well be questioned. This $23,362.15 was not applied in reduction of the County's claim against the bank. Neither the bank nor the Receiver received any benefit from it and we can see no reason why the Receiver should have been required to repay it to the American. The allowance of interest appears to us to place the American in a preferred status as compared with other general creditors of the bank. It may well be, however, that these allowances are not open to attack in this proceeding. But even so, the record shows that Groesbeck and the American will receive all that the decree in the first case gave them, including interest.

The Receiver testified that he expected to be able to pay a further dividend of fifteen per cent (R. 70) on the present recognized claims amounting to $1,583,-

926.88. If this expected dividend is realized, a simple calculation will show that Groesbeck and the American will receive all that they are entitled to under the decree in the first case with the National participating in the dividends.

Petitioners contend:

(b) That the Allowance of Dividends to the National Would Violate the Principle of Equality and Ratable Distribution Established by the National Banking Act.

In petitioners' brief at the top of page 38 the statement is made that:

> "The National Banking Act (R. S. 5236, Sec. 194, New U. S. Code Ann.) requires that dividends to creditors of the bank shall be ratable and without preference,"

and they add that the decision of the Circuit Court of Appeals in this case

> "establishes a preference in favor of Groesbeck's deposit to the detriment of other depositors of the bank and violates the intention of Congress as expressed in the National Banking Act."

To illustrate the point they thus made, the petitioners assume what they refer to as a simple case. They say:

> "Assume ten individuals constitute all the depositors in a bank upon its failure and that each of the ten has ten thousand dollars upon deposit. One would naturally assume under such a state of facts that each of the ten depositors would share equally in and receive one-tenth of the dividends paid by the Receiver." (Petitioners' Brief, p. 39.)

Petitioners' assumption could be true only if we make the additional assumption that the bank has no liabilities except to its depositors. Such an assumption would be a violent one. Dividends are not paid by an insolvent bank to its depositors alone, but are paid to all who can establish that they were creditors of the bank prior to insolvency. It matters not whether one becomes a creditor of a bank by depositing money therein, or by loaning it money on its notes or other form of obligation, or by furnishing it with services or supplies of any kind whatever. Likewise it matters not if one becomes a creditor of a bank by loaning its credit on the basis of an indemnity agreement and bond, as in the case at bar.

All creditors of the bank, and not merely the depositors, are to be considered. The National Banking Act requires, it is true, that dividends shall be distributed ratably and without preference, but this does not mean that all creditors shall ultimately realize the same percentage of their claims. A creditor who has taken collateral or other security may recover in full, whereas one who has neither may suffer a complete loss. If one of the supposed depositors in the sum of $10,000.00 owes a note of $10,000.00 to the bank he can set off the note against the deposit and in this way recover dollar for dollar, although other depositors may receive not more than ten cents on the dollar. All these things may occur without violation of the National Banking Act. All that this Act requires is that the dividends distributed by the receiver shall be ratable and that nothing be done after insolvency which amounts to an attempt to give a preference to one creditor over others—such as the giving of security when the officers of the bank know it is insolvent

and will not reopen. *Ball vs. German Bank*, 187 Fed. 750 (certiorari denied, 225 U. S. 709, 56 L. ed. 1267).

However, even if we assume, in the case supposed by petitioners, that the bank has no obligations not connected with or related to its deposits, it would still be impossible to assume that it has only ten creditors; for, the moment it entered into an indemnity agreement to reimburse the surety on its depository bond, it would have added the surety to its list of creditors, and, when insolvency supervened, its creditors would be the ten depositors and the surety on the depository bond, whose credit had been loaned to the bank in order to secure the deposit of the public funds,—not ten, but eleven.

The argument of petitioners is that since, under the rule announced by this Court in Merrill vs. Bank, *supra*, the secured depositor continues to draw dividends on his entire deposit until he is made whole; if the surety is also allowed to draw dividends on its indemnity claim, the secured creditor and the surety, in the supposed case, would be drawing together dividends on $15,000.00, while each of the other supposed depositors would be limited to dividends on $10,000.00. But this argument overlooks the fact that the secured depositor was a creditor of the bank in the sum of $10,000.00 and is entitled, under the rule in Merrill v. Bank, supra, to draw dividends on the whole debt until he is paid in full; while the surety, by virtue of its contract of indemnity, was a creditor of the bank in an amount which has become fixed by payment in the sum of $5,000.00. The bank's obligation to pay the secured depositor dividends on the face of his deposit until he has been paid in full, and its obligation to reimburse the surety for that part of the bank's debt

which the surety has paid, are entirely separate and distinct. These obligations originated when the bank was solvent. They were incurred as an incident in the transaction of its business. They were legal and valid and involved no preference when created. They could then not become illegal and invalid nor could they work a preference in performance. As said by this court in Merrill vs. Bank, supra, performance of these obligations amounted to no more than "conceding the validity of prior contract rights."

The only thing which could defer the right of the surety to indemnity, until the secured creditor is paid in full, would be some provision in the bond intended to produce that result; but there is no such provision in the bond written by the respondent in this case. In the Centropolis Bank case, *supra,* which was, for all practical purposes, identical with the present case on its facts, and upon which the Circuit Court of Appeals based its decision on the merits in this case, the statement was made:

> "We find nothing in the language of the bond which justifies the contention that the claim of the County upon its contract of deposit should be given any priority over the claim of the Surety Company upon its contract." 17 Fed. (2d) p. 913.

We have already pointed out that the contractual obligation of the bank to reimburse and indemnify the respondent was a new obligation, entirely separate and distinct from the obligation of the bank to repay Groesbeck his deposit of the County's funds. The payment of dividends on both claims at one and the same time could not, therefore, constitute a double payment on either. Failure to recognize this essential distinction is responsible for the confusion, shown by the

trial court in its handling of this case and by the petitioners from the inception of the case to the present.

The point here involved was considered in United States Fidelity & Guaranty Co. vs. McClintock, *et al* (District of Wyoming, decided September 2, 1927, not officially reported), and the court there held:

> "Again the depository surety maintains that it is entitled to be allowed by the Receiver its claim upon its indemnity agreement in the amounts of $25,000.00 paid by it to the County and to receive dividends upon such claim along with the general creditors. This the official sureties admit and consent to, but the Receiver objects, contending that the allowance of the claim of the County for the full amount of the deposit and the allowance of the claim of the depository surety will represent the payment of double dividends from the assets of the bank in derogation of the rights of the other depositors, because of the fact that the only deposit in the bank on a par with other depositors was that of the County, and that the depository surety did not become a creditor until after the bank had closed and had made its payment on its bond. * * * While there seems to be some merit in the contention of the Receiver that such an allowance would represent double dividends in comparison with and affecting the rights of the general creditors of the bank, yet it may be distinguishable and allowable because it is actually a distinct and separate obligation from the obligation of the bank to pay over the funds in its hands to the County Treasurer. Had the bank closed temporarily but during the interim of being closed the depository surety had paid the amount of its bond to assist in making good the County deposit and the bank had afterwards opened and the County received its money in full as a depositor, it could not be contended that the bank was not obligated to pay the surety under its agreement

to indemnify the surety against loss. While the deposit of the County and the bond securing its payment in a sense appear one and the same transaction covering only the deposit of the County, yet the two obligations are distinct in that they grow out of two separate and distinct express or implied contracts. If, for example, instead of having given a bond to secure the County funds, it seemed to be necessary for the bank, for the security of those funds, by contract to increase the capacity or strength of its vaults and the contractor for such work had not been paid at the time the bank closed, could it be contended that the contractor for such work was not entitled to participate with the general depositors of the bank in dividends upon his claim for services thus performed? And yet in that case the obligation of the bank would have arisen out of the transaction involved in the deposit of the County's money in the bank."

The court held further that in addition to being entitled to draw dividends under its indemnity agreement as a general creditor of the bank, the surety was also entitled to be subrogated, the official deposit having been paid in full, to the rights of the County against the bank, and to draw dividends as such subrogee. In this connection the court said:

"Counsel have made a diligent search for authorities upon this point, but have found nothing which is convincing to the court. My view is that the two positions in which the depository surety finds itself are entirely separate and distinct. In one it is a straight creditor of the bank by virtue of the indemnity agreement, in the other it assisted in discharging the debt and making the County whole by virtue of which, the debt having been paid in full, it becomes subrogated in equitable proportions to the rights of the County. The relationship of the two rights are as distinct as

though they were held by different individuals and should be here so regarded. The surety companies of course can participate to no greater extent than to make themselves whole for the sums which they have paid."

Petitioners contend:

(c) That the Court Below Erroneously Applied the Doctrine of Relation Back.

The petitioners say that it would be inequitable to apply the doctrine of relation back in favor of the National because—

"(1) *The National has contributed nothing to the assets of the bank.*

(2) *The National's payment to Groesbeck has not reduced the outstanding claims against the bank, nor has it resulted in any benefit to any depositor except Groesbeck. It is therefore inequitable to permit the National to become a creditor along with general depositors as of the date of the bank's failure.*

(3) *As against Groesbeck it is inequitable and illegal for the National to enjoy dividends at his expense, because it violates the promise of the National contained in its bond.*" (Petitioners' Brief, p. 37.)

They also argue that—

"Any rights which the National has against the Receiver arise from the contract between the National and the bank and to that agreement Groesbeck was not a party. As to that agreement Groesbeck is a third person who has acquired lawful rights against both parties thereto.

> The bank, as principal, and the National as surety, agreed to protect Groesbeck from loss. We contend the doctrine of relation back cannot be applied in favor of the National so as to deprive Groesbeck, an innocent third person, of the rights he has acquired against the National and the bank." (Petitioners' Brief, p. 33.)

Most of these arguments have already been sufficiently noticed. The argument that the National has contributed nothing to the assets of the bank is, of course, fallacious. In this connection petitioners say:

> "If the penalty of the National's bond had been paid to the bank or its Receiver instead of to Groesbeck, the National would be in the same position as others who put money in the bank. Or, if the National's payment to Groesbeck had extinguished the claim of Groesbeck so that the bank's assets were relieved of his claim to the benefit of general depositors, then the National's position might be different." (Petitioners' Brief p. 36-7.)

What difference can it make that instead of paying its $125,000.00 to the bank the respondent paid that amount to Groesbeck for the bank? To all intents and purposes, at least so far as Groesbeck is concerned, it contributed that much to the assets of the bank. The National's payment to Groesbeck reduced the outstanding sum which the bank was obligated to pay Groesbeck by $125,000.00; although the sum on which Groesbeck continues to draw dividends remains without diminution until he is paid in full.

In support of their contentions as above set out, petitioners cite the case of United States Fidelity & Guaranty Co. vs. Wooldridge, 268 U. S. 234, 69 L. ed.

932. The facts in that case, however, are in nowise comparable with the facts in the case at bar. In that case the surety had written a bond guaranteeing the deposit of a railroad company in the bank. It had also written an official bond for the president of the bank. The bank failed through default of the president. The surety company paid on its depository bond the sum of $23,312.51 to the railroad company and was subrogated to the rights of the company against the bank. When suit was brought on the official bond for $25,000.00, the surety company attempted to set off its claim, as subrogee of the railroad company against the bank, against the bank's demand on the official bond of the president. The court held that the two bonds were "wholly independent transactions" and were not brought into mutual account by any agreement of the parties. It assumed for the purposes of the argument that upon the payment to the railroad company, the subrogation of the surety company to its rights related back to the date of its contract, but it held that because the two transactions were wholly independent and not brought into mutual account by any agreement of the parties, there could be no set-off of one against the other.

The case of Springfield National Bank vs. American Surety Co., 7 Fed. (2d) 44, also cited by petitioners, followed the Wooldridge case and made clear the point we have just made that the decision in the Wooldridge case did not turn upon the fact that the doctrine of relation back could not be applied, but on the fact that set-off could not be allowed because there was no mutuality of accounts; the court saying:

> "The two bonds were separate transactions, totally lacking in contact. When other equities

> are involved the right of set-off ordinarily depends on mutual credits which have been defined as 'an existing debt due to one party, and a credit by the other party, founded on, and trusting to such debt, as a means of discharging it.' Scott v. Armstrong, 146 U. S. 499, 13 S. Ct. 148, 37 L. ed. 1059."

To the same effect is the case of Fidelity & Deposit Co. v. Robinson, 7 Fed. (2d) 371, also cited by petitioners. They also cite the case of Johnson v. Jones, 1 Black. 209, 17 L. ed. 117, where an attempt was made to have a deed related back to the date of a title bond. Because of the peculiar facts of that case it cannot be cited as any authority for the decision of the case at bar.

So far as the doctrine of relation back in this case is concerned, the sole question is as to when the relation of debtor and creditor as between the bank and the respondent was created. On this point the authorities are overwhelmingly in favor of the holding of the Circuit Court of Appeals in the Centropolis Bank case, 17 Fed. (2d) 913 that "the relation of debtor and creditor exists between the principal and surety from the time the contract of suretyship is made."

Petitioners contend:

(d) That There is Conflict in the Two Decisions of the Circuit Court of Appeals Involving the Same Subject Matter.

The petitioners contend that there is conflict between the decision of the Circuit Court of Appeals in the case at bar and in the first case, and that both decisions cannot be given full force and effect. In this connection they say:

> "We contend that the first decree denied the National the right to participate in the funds in the hands of the Receiver until Groesbeck and the American were wholly paid, while the present decision of the Circuit Court authorizes the National to compete with Groesbeck and the American in the enjoyment of the same fund." (Petitioners' Brief, p. 41.)

This is another illustration of the failure of petitioners to distinguish between subrogation and indemnity. The first decision merely held that the respondent could not be subrogated to the rights of Groesbeck against the bank until Groesbeck and the American were fully paid. It decided nothing with reference to the indemnity claim which is the subject of this action. On the other hand the decision of the Circuit Court in this action determines the rights of the respondent under its claim for indemnity, and decides nothing with reference to its rights of subrogation.

Petitioners claim that there is a second ground of conflict in that the decision in this case is "opposed to fundamental principles of suretyship law" which were recognized in the decision in the first case. They state the principle which they believe the decision in this case violates by quoting from Cyc as follows:

> "The surety has no rights superior to those of the principal and cannot enforce a lien which the latter could not have enforced."
>
> "The surety cannot be placed in a more favorable position than the principal." (Vol. 37, p. 429)

It seems obvious that this rule of law, though sound in cases to which it applies, can have no application where the surety has, to the extent of its obligation, paid the principal's debt and is asserting rights of re-

covery *against* the principal. The right of subrogation and the right of indemnity are both rights which the surety, in a proper case can assert against the principal. They are neither weakened nor destroyed by the fact that the principal cannot assert them against himself; nor can they be measured or controlled by any right which the principal may or may not assert in its own behalf. This alleged ground of conflict has no real existence. The two decisions are clear and distinct and not in conflict at any point.

CONCLUSION.

We believe we have demonstrated that the subject matter of this action was not *res judicata* by reason of the decision in the first case and that the respondent is asserting here a right which it is entitled to have recognized and enforced. The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

A. E. Moreton,
Counsel for Respondent.

Bynum E. Hinton,
Edwin G. Davis,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 424.—October Term, 1927.

Edward E. Jenkins, as Receiver of the National City Bank of Salt Lake City, Utah; E. J. Groesbeck, Treasurer of Salt Lake County, Utah, et al., Petitioners,
vs.
National Surety Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 14, 1928.]

Mr. Justice Stone delivered the opinion of the Court.

The petitioner Jenkins was appointed receiver of the National City Bank of Salt Lake City, an insolvent national bank, by the Comptroller of the Currency, under the provisions of § 5234, R. S. The respondent National Surety Co. brought this action against the receiver to compel the allowance of and payment of dividends on its claim upon an indemnity agreement executed by the bank. The agreement was contained in the bank's application for a bond by which the bank as principal and the respondent company as surety undertook that the official deposits of the treasurer of Salt Lake County, Utah, up to a named sum, would be repaid on demand. The deposits at the time of the insolvency exceeded the amount of the bond. The district court directed that dividends on the claim for indemnity be postponed until the county treasurer should have been repaid the full balance of his deposit. The court of appeals for the eighth circuit reversed the decree with instructions that the respondent be paid dividends on an equal basis with other creditors, including the treasurer. *National Surety Co.* v. *Jenkins*, 18 Fed. (2d) 707. This Court granted certiorari, 275 U. S. —, to remove a conflict alleged to exist between the decision below and rulings by the courts of appeals in other circuits. *Maryland Casualty Co.* v. *Fouts*, 11 Fed. (2d) 71, *Springfield National Bank* v. *American Surety Co.*, 7 Fed. (2d) 44.

In his answer the receiver prayed that Groesbeck, the county treasurer, and the American Surety Co. be required to interplead.

An order issued and they filed a joint answer, from which it appeared that Groesbeck, as principal, and the American Surety Company, as surety, had given to Salt Lake County an official fidelity bond in the sum of $200,000. The treasurer deposited the county funds in his custody in the bank and took as security the respondent's bond in the sum of $125,000, bonds of other surety companies, executed to him as obligee, in the total sum of $100,000, and from the bank a certain amount of apparently doubtful collateral.

When the bank failed his official deposit amounted to $643,094.29. Salt Lake County was paid in full — $200,000 by the American Surety Co. as surety of the treasurer's fidelity bond; $125,000 by the respondent National Surety Co., the balance by the other surety companies and by dividends paid by the receiver. When the second dividend was paid it was sufficient to pay the final balance due from the treasurer to the county and leave a surplus of over $9,000; but there remained an unpaid balance of the deposit due from the bank to the treasurer.

The claim of the respondent company is for its pro rata share of this surplus and of all dividends paid or to be paid by the receiver as well as of the collateral given to the treasurer by the bank. The claim is resisted by the interpleaded petitioners, the treasurer and the American Surety Co., on two grounds, first, that the right of the treasurer and his surety to full repayment of his deposits before any dividends are paid the respondent is in this case *res judicata;* second, that the respondent is not entitled to share in the estate of the insolvent debtor until the balance of the creditors' claims have been fully satisfied. On both grounds the circuit court of appeals ruled against the petitioners.

The plea of *res judicata* was based on the decree in an earlier suit brought in the district court by the county treasurer and the American Surety Co. against the receiver to determine their right to the excess of the second dividend over the county's claim, to all future dividends and to the collateral. The National Surety Co., the respondent here, was interpleaded and answered. A decree in favor of the American Surety Co. was affirmed by the court of appeals for the eighth circuit. *National Surety Co.* v. *Salt Lake County,* 5 F. (2d) 34. We think the court below was right in holding that the earlier litigation had determined only that the National Surety Co. was not entitled to be subrogated to the treas-

urer's claim and remedies against the insolvent bank until he had been paid in full, and in no way involved the National Surety Company's present separate claim on its contract of indemnity, and that the plea of *res adjudicata* was consequently ineffective. But as the certiorari was granted to review the other branch of the case, and as the view we take of it makes unnecessary an extensive consideration of the first question, we pass at once to the second.

The right now asserted by the respondent arises, not from subrogation to the rights of the treasurer but upon its independent agreement with the bank for indemnity. The bank's undertaking was to indemnify respondent for liability which it might "sustain or incur" by reason of its having given its surety bond, which was conditioned on the bank's keeping its deposits "subject at all times to the check and order of the treasurer." So long as the bank remained solvent respondent would have been entitled to immediate indemnity from the bank even though that payment neither satisfied the treasurer's claim nor exhausted the surety's own liability. *Davies* v. *Humphreys*, 6 M. & W. 153; *Ex parte Snowden*, 17 Ch. D. 44. As between itself and its principal the surety should not have been required to make any payment at all, and to allow it prompt reimbursement would in no way impede the creditor so long as the principal remained solvent. But if, as here, the principal is insolvent, any dividends paid the surety on its claim for indemnity before the creditor's whole claim has been satisfied would decrease the creditor's dividends by his proportionate share of the payments to the surety. They would also result in a species of double proof, detrimental to the principal's other creditors, for the secured creditor would, under the applicable "chancery rule," still be entitled to dividends on his entire original claim. Compare *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131.

Respondent, in insisting on the letter of its agreement, takes a position in effect inconsistent with the obligation it undertook to secure to the treasurer the repayment of his deposits to the extent of $125,000. If after paying that amount to the treasurer it may then compete with him in the distribution of the insolvent's assets, the benefit of the surety bond to the treasurer is diminished *pro tanto*. By the expedient of taking a separate indemnity agreement from the debtor the surety would be enabled to deprive the creditor of the full benefit of the security he had demanded.

The established rule that the surety may not claim subrogation against an insolvent debtor until the creditor is paid in full is a

recognition of the inconsistency of that position. *United States* v. *National Surety Co.*, 254 U. S. 73, 76; *Peoples* v. *Peoples Bros.*, 254 Fed. 489; *United States Fidelity & Guaranty Co.* v. *Union Bank & Trust Co.*, 228 Fed. 448, 455. The rule would go for naught if, by claiming indemnity instead of subrogation, the surety could achieve the same result. The same policy against permitting a surety to compete with the creditor for the insolvent debtor's assets requires that the surety be denied subrogation to security given to a creditor for several debts for only one of which the surety is obligated. *National Bank of Commerce* v. *Rockefeller*, 174 Fed. 22. Similar reasoning underlies the requirement of equity that the surety who holds the security of an insolvent debtor must give the benefit of it to the creditor for whom he is surety, until the debt is fully paid. See *Keller* v. *Ashton*, 133 U. S. 610; *Hampton* v. *Phipps*, 108 U. S. 260; *Chamberlain* v. *St. Paul*, 92 U. S. 299, 306; 2 Pomeroy, Equitable Remedies (2d ed.) § 925.

Wherever equitable principles are called in play, as they preeminently are in determining the rights and liabilities of sureties and in the distribution of insolvents' estates, they likewise forbid the surety to secure by independent contract with the debtor indemnity at the expense of the creditor whose claim he has undertaken to secure.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.